CRIMINAL HISTORY WORKING GROUP REPORT

CATEGORY 0

CATEGORY VII

CAREER OFFENDER

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I. INTRODUCTION

During the past two amendment cycles, the Criminal History Working Group has studied two provisions of the Criminal History Guidelines the Commission identified as potentially problematic: the criminal history "categories" and the "career offender" provisions.

Criminal History Categories

The Working Group first studied amending the criminal history categories during the 1990 amendment cycle. The concern was that use of present categories I and VI resulted in an inaccurate measure of and punishment for a defendant's past criminal behavior inasmuch as the range of prior criminal behavior exhibited by defendants in both of these categories was found to be great. To avoid potential disparity in the types of defendants who are categorized together, the group researched the possibility of creating additional criminal history categories at either, or both, ends of the guideline spectrum: that is, Categories 0 and VII.

With regard to Category I, the guidelines assign defendants with no criminal history points or with one criminal history point to Category I.[1] Accordingly, the following types of defendants are classified together: (1) defendants who have no prior record; that is, no prior arrests, no pending charges, no dismissed charges, and no prior convictions (0 points); (2) defendants who have prior arrests, pending charges or dismissals, but no prior convictions (0 points); (3) defendants who have prior convictions that are not counted under the guidelines because of definitions and instructions under §4A1.2 (0 points);[2] and (4) defendants who have a prior countable conviction that totals only one point. Thus, while all defendants in category I are treated similarly for purposes of criminal history, the members of the category have dissimilar levels of previous contact with the criminal justice system. That being the case, at the Commission's request, the group has examined the feasibility and consequences of establishing a Category 0 for the "true first offender."[3]

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[1] See §§4A1.1 and 4A1.2.

[2] E.g., "stale" convictions, military convictions, tribal convictions, foreign convictions, etc.

[3] The precise definition of "true first offender" has yet to be articulated. For Monitoring's purpose, however, the "true first offender" is that defendant with no known criminal justice encounter of any kind, that is, no arrests, indictments, or convictions.

At the other end of the criminal history spectrum, defendants with 13 or more Criminal History points are assigned to Category VI.[4] Unlike the other five criminal history categories, Category VI contains no upper point limit. Accordingly, this open-ended feature results in defendants with criminal history points significantly higher than 13 being treated the same as defendants with only 13 points. The Working Group studied the creation of a new Category VII to the sentencing table as an option to better distinguish between defendants with numerous criminal history points.

Career Offender

The Working Group's analysis of the "career offender" guideline continues work begun during the 1991 amendment cycle. The group considered the advisability of two possible amendments to §4B1.1. One amendment would widen the scope of the guideline by eliminating the requirement that qualifying prior offenses occur within a specified number of years of the instant offense, or, in other words, by eliminating the "decay factor." The other amendment would narrow the scope of the guideline, possibly by identifying and excluding certain types of "less serious" offenses from the definition of "crimes of violence."

In recent years, some have suggested that the existence of a decay factor in determining career offender status is illogical; that is, if an individual has truly made a career out of crime, one might expect that at least one of his qualifying prior crimes might lie outside the ten- or fifteen-year time limit imposed by the decay factor. Yet, notwithstanding a life of crime, this person is not considered a career offender because of the decay factor. Furthermore, it has been noted that the statutory directive makes no mention of a decay factor -- nor do other statutory enhancements, including the Armed Career Criminal Act. It is this criticism that has prompted the Working Group's present study.

The Working Group has also considered narrowing the scope of the career offender guideline by identifying and excluding certain types of "less serious" offenses from the definition of "crime of violence" and "controlled substance offense." Some express concerns that the present definition of these sweeps too broadly and thus overrepresents the seriousness of some defendants' past criminal conduct.

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[4] A defendant may also be in Category VI if he is designated a career offender in §4B1.1 or an armed career criminal in §4B1.4(c)(2).

Note on Options

The options listed within each section below have been identified by the Working Group as having some degree of utility in resolving the issues and problems outlined above. The Working Group has attempted to be inclusive, rather than exclusive, in providing options.

To the extent possible, the options are derived from, and supported by, monitoring data, case file review, and relevant legal considerations. A brief discussion of the policy considerations, advantages, and disadvantages of the amendment follows each option, when appropriate. The discussion is not comprehensive, but touches only on general implications of each option. The Working Group recognizes the existence of additional implications of each option, and intends to explore more fully those implications in the coming period of study and discussion.

The Working Group has not attempted to narrow the list of options to a suggested list of recommended solutions.

II. CATEGORY 0

A. RELEVANT LEGISLATIVE HISTORY

With respect to the issue of creating new criminal history categories, the statute and legislative history do not provide any impediment. The only provision that bears on this issue is 28 U.S.C. § 944(j), which requires the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." This language could be relied on to justify a Category Zero if the Commission determines that the guidelines fall short of the statutory directive to insure that first offenders committing non-serious offenses are given alternative punishments.

B. EMPIRICAL FINDINGS

Methodology:

The Monitoring data base of approximately 30,000 guideline cases sentenced in FY90 was used for the empirical analysis. Offenders in Criminal History Category I, for whom court information (SOR) was available, were selected and grouped into three subcategories:

1. True first offenders with 0 points and with no known criminal history of any kind, (i.e. no juvenile or adult arrests or convictions);
2. Offenders with 0 points, but some known criminal history, that is, prior arrests, or convictions; and
3. Offenders with 1 criminal history point.

A statistical profile of the subcategories was constructed to compare the three groups in terms of offense and offender characteristics, and to examine whether true first offenders are significantly different and distinct from the other two groups of offenders included in Criminal History Category I.

Findings:

Cases in Criminal History Category I constitute 61 percent of the total number of guideline cases in FY90. The 9,424 cases in Category I with available court determination form the base figure for the analysis in this section.[5]

A series of criminal history variables from Monitoring data were analyzed to divide Category I cases into three subcategories: defendants with no known criminal justice encounter of any kind (true "First Offenders"), defendants with some past criminal activity (arrests only, or uncounted convictions) and 0 criminal history points ("Offenders with 0 Points"), and defendants with 1 criminal history point, ("Offenders with 1 Point"). Of the 9,424 defendants in Category I, 5,426 (or 57.6%) are First Offenders; 2,554 (or 27.1%) are Offenders with 0 Points, and 1,444 (or 15.3%) are Offenders with 1 Point.

The three subcategories of defendants were compared on a variety of offense, offender, and case processing variables, as reported in Tables 1 to 15 in Appendix B-A. Following are some of the findings from these comparative analyses.

Offense Behavior Characteristics:

1. Offense Type: There seems to be some difference between first offenders and other offenders in Category I in terms of their offenses of conviction (see Table 1). First offenders seem to be comparatively more concentrated in embezzlement, less in robbery, drug distribution (which is still at least 40% within each subcategory), and firearms violations. This fact, in many ways, drives the remainder of the findings in this section, for the severity of offense behavior, its processing and punishment are closely related to the offense type itself.

2. Injury to Victim: While victim injury figures for the instant offense are overall low in Category I cases (see Table 2), it is lowest for first offenders (0.7%), followed by offenders with 1 point (1.8%), and offenders with 0 points (2.8%).

3. Weapon or Threat: Similarly, the presence or use of threats and weapons in the instant offense is lowest in the subcategory of first offenders (2.7% of cases), compared to offenders with 0 points (6.3%) and offenders with 1 point (5.8%) (see Table 3).

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[5] The total number of cases for specific tables may vary, due to the exclusion of cases for which one or more of the variables analyzed is missing. In addition, for variables drawn from the FPSSIS files data were no longer available for approximately the last month of FY90.

4. Scope of Criminal Activity: It appears that first offenders are much more often involved in single criminal acts, and less often in ongoing criminal activity, than are the two other offender subcategories (see Table 4).

5. Role: First offenders also tend to act alone more often, and when acting with others, they seem to share slightly less culpable roles (see Table 5).

6. Offense Level: First offenders show a higher concentration in the lower offense levels than do the two other subcategories of defendants (see Table 6). Fifty two percent (52%) of first offenders, compared to only 44.6 percent of offenders with 0 points and 46.5 percent of offenders with 1 point are at offense levels providing for alternative sentencing options (Level 12 or below); while 14.3 percent, 18.4 percent and 17.6 percent of these subcategories, respectively, are in the highest offense levels (Level 27 or above).

Case Processing Characteristics:

7. Counts of Conviction: While the majority of all cases have single count convictions, this finding is somewhat more so for first offender cases (79.5% versus 75.9% and 75.5 % in the other subcategories) (see Table 7).

8. Sentence Type: Corresponding to a generally lower offense level, (see Table 6), first offenders also benefit more from alternative community based sentences than do their counterparts with 0 or 1 criminal history points (see Table 8). Fully 36 percent of the first offenders, compared to only 24.5 percent and 27.5 percent of the other subcategories, respectively, receive probation of some form.

9. Length of Probation: When given probation, first offenders also tend to receive shorter terms (15.5% up to 12 months, 37% up to 24 months) than offenders with 0 points (10.9% up to 12 months, 28% up to 24 months) and offenders with 1 point (11.5% up to 12 months, 31% up to 24 months) (see Table 9).

10. Length of Incarceration: Of those Category I offenders sentenced to incarceration, there seems to be little variation by category (see Table 10), other than perhaps first offenders receiving slightly more of the shortest sentences (up to 12 months), and slightly less of the longest ones (120 months and above).

11. Sentence Relative to Guideline Range: In relation to their final guideline range, many more of the first offenders receive lower sentences (29% below range, 40.5% at the bottom of the range) than do the other subcategories (25.6% and 24.1% below range, 33.6% and 35.4% at the bottom of the range, respectively); with less above range departures as well (see Table 11).

Offender Characteristics:

12. Offender's Sex: Both in relation to the entire federal population of defendants, and those in Criminal History Category I, the percent of females is significantly higher (27% versus 15% and 15%) in the first offender subcategory (see Table 12).

13. Offender's Race: Proportionately more Hispanics and less Blacks comprise the first offender group than the other two subcategories (see Table 13).

14. Offender's Marital Status: A significantly higher percent of first offenders compared to offenders with 0 or 1 points are married, (47% versus 38% and 37%) a fact perhaps linked to the sex variation found between the categories (see Table 14).

15. Offender's Education: Considerably more of the first offenders than offenders with 0 or 1 points completed at least high school or more (see Table 15).

Some other variables, such as circuit, mode of conviction, and offender's age show either no or only slight variations among the subcategories of offenders, without any discernable pattern.

In summary, it seems that the group identified as First Offenders for the purposes of this analysis seems to be sufficiently different on a host of offense, offender, and case processing variables. Specifically, they are engaged proportionately more in **non-violent white collar crimes** and less in violent or drug offenses, a factor reflected in some of their offense behavior characteristics, case processing, and sentence type. Adding to the above, the existence of no prior encounter of any kind with the criminal justice system might justify some form of consideration for this offender subcategory at sentencing.

C. OPTIONS

Two general questions require attention in connection with this issue: (1) what class of "first offender" might be placed in a new Category 0; and (2) what specific alternative punishments should be applied to that class? The Criminal History Working Group proposes only to address the first issue; the second issue of developing specific alternative penalties that apply to the first offender will be left to the Alternatives Working Group.[6]

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[6] Such alternatives might include, for example, Chapter Two adjustments to the offense level, Chapter Four adjustments, the establishment of a separate criminal history category, or expansion of the availability of probation or other alternatives to imprisonment.

Issue 1 -- Establishing Classes of Offenders

Various classes of offenders might be established with the objective that they receive alternative, less severe, punishment. Such a division of Category I offenders into two classes -- Category 0 offenders and Category I offenders, with the former being punished less severely than the latter -- presumably would be based on two foundations: different offender and offense characteristics, or different criminal histories, might vary in some way.

Class I -- "True First Offender" -- a person with no criminal history points, and no known criminal history of any kind, as either a juvenile or an adult, including no contact with any criminal justice system of any kind.[7]

Class II -- "First Offender" -- a person with no criminal history points who may have had contacts with the criminal justice system, such as arrests, or dismissed charges, that, for constitutional reasons, generally could not be considered in determining a criminal history score. Such persons might or might not have been proven to have committed the criminal conduct that was the subject of an arrest or a dismissed charge, or even of a conviction reversed on constitutional grounds, when it was clear that the defendant was factually guilty of the conduct for which he was charged.[8]

Class III -- "Offender with 0 Points" -- a person with no criminal history points, but (1) convictions that are presently not countable by the guidelines; that is, stale convictions, foreign or tribal convictions, expunged convictions, or (2) with certain types of "serious" prior or instant convictions. (These two groups are not necessarily mutually exclusive, and some combinations are possible).

Implications of Distinguishing the Classes: it would appear difficult for the Commission to justify a criminal history score enhancement as a result of unadjudicated charges on the ground that the existence of such charges suggests that the defendant has in fact been guilty of wrong-doing.[9] Indeed, there would appear to be serious constitutional obstacles to the use of an arrest record, by itself, to enhance a criminal history score,

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[7] Such offenders might be considered to include persons who simply admit to having illegally entered the United States. Such admitted entry might be considered at least as serious as an arrest, where an arrestee/detainee has not necessarily admitted the unlawful conduct. Nevertheless, this admittedly illegal alien status does not rise to the level of a contact with the criminal justice system. An offender in such a situation might be more appropriately compared with the offender whose criminal conduct, whether or not admitted, was otherwise unknown to the criminal justice system.

[8] Departure language addressing such situations might be included in commentary.

[9] As now written, §4A1.3 provides that "a prior arrest record itself will not be considered" as a ground for departure based on inadequacy of the criminal history.

although proof of the conduct underlying the charge arguably could be a basis for refusing to give "true" first offender treatment, just as it is now a ground for upward departure. In addition, if the Commission did decide to enhance punishment for persons with arrest records, such a decision would have to be based on the notion that the commission of a crime following exposure to the criminal justice system, even if only an arrest, suggests a greater prediction of recidivism. Of course, use of classes II or III present some practical difficulties in determining the existence of certain aged, tribal, foreign, or expunged sentences.

Option 1:

No change from the present system.

Implications: offenders with no prior arrests or with no prior convictions who generally have less serious offender characteristics and offenses than Category I offenders with prior uncounted convictions, would continue to be treated as harshly as the latter offenders. On the other hand, white collar offenders, who some believe to be traditionally overpunished, are disproportionately in the "true first offender" class, and would receive an additional reduction in sentence, if the Commission lowered the present sentencing range for true first offenders.

Option 2:

Modify the existing sentencing table, or other guidelines, to punish one of the above classes of offenders less severely than other classes who make up all Category I offenders.

Implications: The Commission would have to identify the offenders that it wished to benefit by creating a new classification and then would have to determine how to quantify the reduction for the new group. Notwithstanding these drafting challenges, however, the modification would appear useful if offenders with differing levels of prior contact with the system, in a constitutionally acceptable manner, given the correlation between prior contacts and pertinent offender characteristics.

Option 3 -- Alternative Punishments for First Offender Class:

Having identified the various classes of first offenders for whom alternative penalties might be indicated, the Criminal History Working Group defers to the findings and recommendations of the Alternatives Working Group with respect to specific alternative punishments for the selected class of first offenders (see footnote 7 and accompanying text, supra).

III. CATEGORY VII:

A. RELEVANT CASE LAW

Upward Departures Due to Inadequacy of Criminal History Score

One aspect of guidelines application that bears on the proposal to add a Category VII to the Sentencing Table is the manner in which courts presently deal with defendants who have criminal history points in excess of 13. Reported appellate decisions show three different approaches to reviewing upward departures in such cases. One approach is to use a rather loose standard of "reasonableness" or "proportionality" in determining whether a departure was proper. United States v. Russell, 905 F.2d 1450 (10th Cir.), cert. denied, 111 S.Ct. 267 (1990); United States v. Brown, 899 F.2d 94 (1st Cir. 1990); United States v. Rogers, 917 F.2d 165 (5th Cir. 1990), cert. denied, 111 S.Ct. 1318 (1991); United States v. Christoph, 904 F.2d 1036 (6th Cir. 1990), cert. denied, 111 S.Ct. 713 (1991).

Another approach is to extrapolate new categories on the criminal history axis of the sentencing table. Only the Seventh Circuit has required district courts to follow this method when departing beyond Category VI. United States v. Schmude, 901 F.2d 555 (7th Cir. 1990). The Fifth and Tenth Circuits have held that such an approach satisfied the reasonableness test. See e.g., United States v. Kalady, ___ F.2d ___, 1991 WL 153144 (10th Cir. 1991); accord, United States v. Suarez, 939 F.2d 929 (11th Cir. 1991).

A final approach is to treat a defendant with an especially aggravated prior criminal history as if he were a career offender. United States v. Joan, 883 F.2d 491 (6th Cir. 1989); United States v. Gardner, 905 F.2d 1432 (10th Cir.), cert. denied, 111 S.Ct. 202 (1990).

B. EMPIRICAL FINDINGS

Methodology:

The Monitoring data base of approximately 30,000 guideline cases sentenced in FY90 was used for the empirical analysis. Offenders in Criminal History Category VI, for whom court information (SOR) was available, were selected and divided following two options:

1. Category VI = 13-15 points, Category VII = 16 or more points;
2. Category VI = 13-19 points, Category VII = 20 or more points.

Offender profiles were constructed for both options, including offense and offender characteristics, for a comparative analysis of cases that would constitute a new Category VII.

Findings:

The cases in Criminal History Category VI constitute approximately 7.9 percent of all the guideline cases in FY90. The 1,590 defendants in this category with available court determination form the basis of an empirical comparison of two options to create a new category VII.[10] Option I would limit category VI to 13-15 points, thereby dividing the 1,590 applicable cases to 32 percent in Category VI, 68 percent in Category VII. Option II would cap category VI at 19 points, placing 44 percent of the 1,590 applicable cases in Category VI and 56 percent in Category VII.

Following is an initial comparison of the two proposals, based on empirical findings of the offense, offender, case processing and criminal history profiles of relevant cases. (See Tables 16-30 in Appendix B-B).

One note of caution in interpreting findings of this section is in order: all of the defendants sentenced as career offenders are included in current Category VI, independent of the number of their criminal history points, thus affecting the distribution of a series of variables such as primary offense type and offense level, plea rate, departures, and sentence length. Under both options for alternate Categories VI and VII, career offenders would remain in Category VI (unless the Commission decides to amend §4B1.1), except when a career offender's criminal history points exceed the cap for Category VI.

Offense Behavior Characteristics:

1. Offense Type: There is no clear indication in the findings that the two options used in creating Category VII would significantly alter the internal distribution of within-category cases by primary offense type (see Table 16).

2. Victim Injury: Approximately three percent of all cases in Category VI involve some degree of victim injury, and that percentage would remain fairly constant under both options in the new categories.

3. Weapon or Threat: Seventeen percent of all cases in Category VI involve some form of threat or weapon in the offense conduct, with 8 percent of cases in the category having a firearm as the weapon used. Again, this percentage seems to remain unaffected by either option in creating the new categories.

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[10] The total number of cases for specific tables may vary due to the exclusion of cases for which one or more of the variables analyzed is missing. In addition, for variables drawn from the FPSSIS files data were no longer available for approximately the last month of FY90.

4. Role in the Offense: The two proposals appear to create some shift in the types of cases included in the new categories by offender's role. While option I leaves an equal proportion (57%) of cases where the offender acted alone in Categories VI and VII, option II shifts proportionately more of these cases to Category VI (61.5% versus 53.4%). Similarly, for cases where the offender was not acting alone, option II seems to move proportionately more of the higher role/culpability cases to Category VII than does option I (see Table 17). There is no similar pattern apparent, however, when examining the scope of criminal activity.

5. Offense Level: The within-category distribution by offense level seems to shift toward a somewhat higher concentration of the more serious offenses in Category VII under option II than under option I (see Table 18).

Case Processing Characteristics:

6. There is no discernable variation between the alternate categories by circuit, by number of charges (with approximately 69% of all cases single count), or by plea rate (approximately 83% in both categories under either option).

7. Sentence Type and Length of Incarceration: The majority of all Category VI cases received a sentence of incarceration. Only 32 (2.1%) of all cases were given probation, with 11 of those sentenced to a term of probation longer than three years. The remaining 98 percent of cases were sentenced to prison, with the length of imprisonment varying somewhat between Categories VI and VII based on the option applied (see Table 19). There is also a similar though slight shift between options in the position of sentences relative to the guideline range (see Table 20).

Criminal History:

8. Career Offender: The career offender guideline was applied in 30 percent of all cases in Category VI. Not surprisingly, the proportion staying in the new Category VI is considerably affected by the option chosen: 42 percent of the category capped at 15 points would be comprised of career offenders compared to 35.8 percent of the category capped at 19 points (see Table 21).

9. Commission of the Instant Offense Under Criminal Justice Sentence, and/or within Two Years of Release: On both of these measures, the two options create different within-category distributions, in the general direction of less recent criminality in Category VI when capped at 15 as compared to when capped at 19 (see Tables 22 and 23). Findings on the offender's criminal justice status at the time of the offense show a similar trend (see Table 24).

10. Indicators of Prior Encounters with the Criminal Justice System: A set of available factors on criminal history was reviewed in constructing a comparable profile of offenders who would be included in Categories VI and VII under the two alternatives. While the alternatives would create little difference in the distribution of offenders by juvenile convictions (with approximately 24 percent of all current Category VI cases having one or more such conviction), they differentiate between the subgroups of offenders by their numbers of adult convictions (see Table 25).

The incarceration history of offenders in current Category VI is varied: 41 percent of them had received at least one prison term of five years or longer, this percentage being consistently higher for new Category VI (46%) than for new Category VII (38.5%) under either option (see Table 26). The difference is more pronounced, but in the same direction, for offenders who had received at least one prison term one to five years long (see Table 27), and offenders sentenced to one or more prison terms of 31 days to one year, (see Table 28).

There is some variation in the number of prior revocations offenders have had in optional Categories VI and VII (see Table 29), with the caveat that there might be an inverse relationship between the number of criminal history points (based on the number and severity of prior sentences), and the number of revocations (possible only once the offender is on probation/parole).

Finally, the percentage of offenders with prior convictions for offenses similar to their instant one appears to be higher for Category VI under both alternatives (see Table 30). Again, this possibly reflects the presence of career offenders in that category, defined as a prior and instant combination of only two offense types (i.e., violent or controlled substance offenses).

Offender Characteristics:

11. Reviewing background factors such as the offender's sex, race, age, marital status, and education, no clear discernable patterns emerge in the within-category distributions between the two options for dividing Category VI.

In summary, although a numerically more even division of cases into alternative categories occurs when capping the new Category VI at 19 points, neither option seems to create two naturally distinct groups, partially due no doubt to the confounding effect of career offenders within this group of cases. Another issue to consider is the possible reversal of the meaning of criminal history points beyond a certain number. Some offenders, for having the opportunity to accumulate a large number of points, must have committed less serious/violent crimes, resulting in shorter, less incapacitating sentences. Conversely, the offender accumulating a number of serious violent crimes would be more likely to have been stopped from repeat offending by a lengthy prison term.

C. OPTIONS

The following issues arise with respect to increasing penalties for defendants with higher criminal history point totals. Various options to address the proposed Category VII might be drawn from virtually any combination of resolutions of the issues listed below.

Issue 1:

Should the sentencing table be changed to add a new Category VII? Or should the more serious offenders continue to be sentenced more harshly solely through departure?

Implications: a system requiring departures in order to sentence offenders higher than Category VI would allow sentences of the majority of persons with higher point totals to remain where they are currently, while permitting the most serious offenders to receive higher sentences. The general similarity of Category VI offenders in terms of offender and offense character tends to argue against a further division of the category -- such a division might arbitrarily punish relatively similar offenders differently, particularly where a difference in three points at these high point levels becomes less and less meaningful. Nevertheless, there can be little question that offenders with unusually high criminal history point totals (e.g. twenty or more) might be extremely recalcitrant and serious offenders who may deserve appropriately severe sentences. A structured departure might be recommended in commentary. Nevertheless, since even structured departures are less frequently used, and less consistently applied, mere reliance on departures to execute such sentences may result in disparity. The creation of a Category VII may reduce the number of departures now felt to be necessary.

Finally, data show that in a number of cases, the more serious offender is not necessarily the one with the greatest number of points, but could be the offender with a small number of convictions for serious offenses resulting in lengthy terms of imprisonment that precluded commission of additional countable crimes. Increasing punishment based on point totals alone may not capture the serious offender.

Issue 2:

If a new Category is added, what should be the point spread of the new Category (three points, seven points, or more)?

Implications: consistency with the current sentencing table might indicate the need for a three-point spread within the Category. Such a spread approximates the points received for a lengthy sentence. Nevertheless, as the total number of criminal history points increases, the addition of only three points is proportionately less significant -- a larger point

spread of perhaps seven points might be called for, thus restricting to the most serious offenders any penalty that is increased under the new Category. A three point spread also results in a category with a relatively small population.

Issue 3:

If a new Category is added, what should be the appropriate guideline ranges for the new Category?

Implications: this appears to be almost exclusively a policy decision for the Commission to consider. Consistency with the current graduated penalty structure may be called for, or increased ranges appropriate to the seriousness of the offenders in the new Category may be required. Empirical data suggest no particular choice of range will result in a well-differentiated population.

Issue 4:

If the offender with high criminal history point totals is subject to departures, (1) under what conditions might a departure be entered (general sense of inadequacy of criminal history; or more strict triggering for every [three] criminal history points); and (2) how would the departure be structured (by some principle of reasonableness, analogy to career offender, 10-15% extrapolation of the guideline range)?

Implications: Where a 10-15 percent extrapolation is not required, relatively severe and unstructured sentences might occasionally result from these departures although such severe, less structured departures have sometimes been considered essential to a just punishment of unusually serious offenders (see section on ease law).[11]

A departure system based on specific point total increase (e.g., every three points) may overrepresent the importance of points at these upper levels. See empirical data suggesting more serious offenders in Category VII may have fewer points. Such a system would, however, provide additional structure, and reduce disparity in sentencing of persons with similar criminal history point totals.

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[11] Judge Stephen Anderson of the Tenth Circuit has written the Commission calling for commentary guidance in the area of structuring §4A1.3 departures for serious offenders. Judge Anderson also suggests that the commentary endorse the approach taken by the Seventh Circuit, and expressly permitted by the Tenth Circuit. See Relevant Case Law discussion at Section A, supra. Letter from Judge Stephen H. Anderson to Chairman William W. Wilkins, Jr., and Commissioner Julie E. Carnes (August 2, 1991).

Note that the present guideline provides for upward departures based on §4A1.3 (Inadequacy of Criminal History), and the extent of the departure must remain consistent with that circuit's particular practice (reasonableness requirement, 10-15 percent increase in range, career offender analogy).

Issue 5:

How will career offenders be treated where the career offender lacks the "earned" criminal history points to be subject to the new Category VII? Should the career offender with inadequate points to achieve Category VII remain in Criminal History Category VI, or should the offender be placed in the newly created Category VII?

Implications: The current sentencing table has been established so that combinations of Category VI and the appropriate offense level generally trigger a sentence "at or near the statutory maximum," as required by statute. However, placement in Category VII generally would achieve similar sentences at the maximum, and such a rule might appropriately require career offenders to be sentenced at least as high as any other offender. Of course, in combination with placing career offenders in Category VII, the offense level for each type of career offender could be lowered to result in the same range as would currently apply.

IV. CAREER OFFENDER -- NARROWING QUALIFYING PRIOR CRIMES

A. INTRODUCTION

The Working Group has considered narrowing the scope of the career offender guideline by identifying and excluding certain types of "less serious" offenses from the definition of "crime of violence" and "controlled substance offense". Some express concern(s) that the present definition sweeps too broadly and thus over-represents the seriousness of some defendants' past criminal conduct.

"Crime of violence" is defined in §4B1.2(1) as "any offense under federal or state law punishable by imprisonment for a term exceeding one year that has as an element the use, attempted use, or threatened use of physical force against the person of another...." Pursuant to this definition, some statutes may meet the elements of threatened or actual use of force, but the conduct needed to satisfy those statutes may be less serious in nature than the conduct that one generally envisions as constituting a crime of violence. For example, in some states, a barroom brawl is subject to conviction under a felony assault statute or a heated verbal dispute with an acquaintance can constitute a violation of a terroristic threat statute.

Likewise, the definition of a "controlled substance offense" stated in §4B1.1(2) as--"an offense under federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance..."--can include drug related offenses in which a defendant was a minimal participant, as well as conduct in which the defendant was a more active player. As a result, individuals whose prior conduct has not been perceived previously by courts to warrant severe imprisonment may meet the definition of a career offender and find themselves facing a more severe punishment than more serious offenders involved in the instant offense.

B. RELEVANT LEGISLATIVE HISTORY

The career offender provision is the result of a congressional directive to the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for adult defendants who have been convicted of a felony that is "a crime of violence" or one of a list of controlled substance offenses, and who have "previously been convicted of two or more prior felonies, each of which is a crime of violence" or one of the same list of controlled substance offenses. 28 U.S.C. § 994(h). This provision has raised three questions of statutory interpretation concerning the narrowing of the present guideline definition concerning career offender status:

(1) Does the Commission have latitude to narrow the definition of "a crime of violence"?

(2) Does the language "at or near the maximum term authorized" permit the Commission to create different ranges for career offenders who have committed different types of prior offenses?
(3) Did Congress express any intent on whether the application of a career offender guideline should be affected by:

(A) the age of a defendant's qualifying prior convictions;
(B) how close, in time, the defendant's qualifying prior convictions were to each other?
(C) the timing of the qualifying prior offenses. Specifically, does the phrase "previously been convicted of two or more felonies" permit the Commission to require that the offense underlying the second prior felony follow conviction for the first felony or does this language require the triggering of career offender status when there merely exists two instances of qualifying prior conduct constituting two separate convictions.

1. Does the Commission Have Latitude to Refine "Crime of Violence" Definition?

The definition of "a crime of violence" under the career offender guideline has been amended three times since the guidelines went into effect. In the original version, the Commission simply referenced 18 U.S.C. § 16 in the guideline and the commentary to §4B1.2 stated:

> "a crime of violence" is defined in 18 U.S.C. § 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.

U.S.S.G. §4B1.2, comment. (n.1).

The Commission amended this definition in 1989. In the guideline, itself, the Commission deleted its reference to 18 U.S.C. § 16 and instead provided a definition that

tracked the definition of a "violent felony" found in §924(e) (Armed Career Criminal Statute) . The first prong remained the same ("has as an element the use, attempted use, or threatened use of physical force against the person of another"), but the second prong was modified to read that the offense is a "crime of violence" if it "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The commentary continued to list certain "included" offenses, and basically restated the language from the guideline.[12] In fact, the 1989 amendment made the guideline definition identical to the section 924(e) definition of "violent felony," except that the guideline requires "burglary of a dwelling" rather than just a "burglary," as is specified by §924(e).

The 1991 amendments make two more changes to the commentary. The second prong now reads:

> (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

U.S.S.G. §4B1.2, comment. (n.2). The commentary also now states that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. As noted in the case law summary section of this report, this approach -- focusing on the elements for which the defendant was actually convicted -- is the same approach that the Supreme Court recently took in interpreting 18 U.S.C. § 924(e). See discussion of Taylor v. United States, 110 S.Ct. 2143 (1990), infra.

From the very beginning, the Commission has stated that certain offenses (e.g., murder and robbery) are always crimes of violence. A related question is whether the Commission may also state in the guideline that certain offenses that would otherwise meet the definition of a crime of violence should **not** be considered in determining career offender status. This question was addressed in a memo last year by General Counsel John Steer. See Appendix. That memo, which was part of last year's Criminal History Working Group Report, concluded that a sound argument could be made that the Commission has the latitude to exclude less serious crimes from the definition of "crime of violence" under the career offender guideline.

Reaching this conclusion requires an examination of the legislative history of §994(h), which refers to instant and prior offenses that are "crime[s] of violence." The Senate Report on the Comprehensive Crime Control Act of 1984, S. Rep. No. 98-225, in the portion

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[12] According to Appendix C, Amendment 268, "[t]he definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)."

discussing this subsection, does not elaborate on the meaning of the term "crime of violence." Elsewhere in the Act, however, Congress added a new section to Chapter 1 of Title 18 of the United States Code, 18 U.S.C. § 16[13] which defines the term "crime of violence." Thus, the inquiry is two-fold: (1) did Congress intend to apply the definition of "crime of violence" found in section 18 U.S.C. § 16 to 28 U.S.C. § 994(h); and if so (2) does that definition prevent the Commission from providing a narrower definition of the term for purposes of the career offender guideline?

As noted above, the Senate Report does not define "crime of violence" in its discussion of section 994(h). In fact, nowhere in the Report's discussion of any of the new Title 28 provisions does it define that term. Nor does it even make a reference to the other part of the Comprehensive Crime Control Act [CCCA] -- Title II, Section 1001(a), which creates 18 U.S.C. § 16 -- that provides a definition of the term "crime of violence" in Title 18. This omission arguably supports the notion that Congress did not mean to tie the Commission's hands in drafting this aspect of the career offender guideline. That conclusion is buttressed by the fact that in discussing other titles of the Comprehensive Crime Control Act, the Report makes explicit reference to § 1001(a) of the Act. For example, the portion of the Report dealing with Part A of Title X, Miscellaneous Violent Crime Amendments, Murder for Hire and Violent Crime in Aid of Racketeering Activity states:

> The term "crime of violence" is defined, for purposes of all of Title 18, United States Code, in section 1001 of the bill . . . Although the term is occasionally used in present law, it is not defined, and no body of case law has arisen with respect to it. However, the phrase is commonly used throughout the bill, and accordingly the Committee has chosen to define it for general application in title 18 U.S.C. § 16. which defines the term "crime of violence." The definition is taken from S. 1630 as reported in the 97th Congress.[14]

Senate Report at 307. This passage also suggests, by negative implication, that this new title 18 provision was meant to be the authoritative definition of "crime of violence" only where that term appears in title 18, rather than title 28.

A contrary argument could just as easily be made, however. That is, Congress having just defined a "crime of violence" in the CCA, if it would seem strange that if intended that a different definition should apply in the Sentencing Reform Act [SRA]. Indeed, supporting this contrary argument is a comment in a House Report to a later bill amending the Sentencing Reform Act. In that report on the Sentencing Guidelines Act of 1986 (H. Rep. No. 99-614, May 28, 1986), the Judiciary Committee made certain "fine-tuning" amendments to the Sentencing Reform Act. In commenting on the Commission's duty in 28 U.S.C. §

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[13] See Pub. L. 98-473, Title II, § 1001(a), 98 Stat. 2136.

[14] See S. 1630, as reported, § 111; S. Rep. No. 97-307.

994(j) to assure that the guidelines reflect "the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury," the Report observes that the term "crime of violence" is defined in 18 U.S.C. § 16. H. Rep. at 3, n.21. This comment in a House committee report to a later statute of course is not a binding interpretation of the S.R.A. Waterman's S.S. Corp. v. United States, 381 U.S. 252, 269 (1965) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). This is especially true in light of the fact that the 1986 Act did not alter portions of the S.R.A. dealing with the term "crime of violence." Nonetheless, this passage arguably does give at least a general sense of what Congress meant by a "crime of violence."

Even if Congress had the title 18 definition of "crime of violence" in mind when it drafted 28 U.S.C. § 994(h), however, the question remains whether Congress meant to deprive the Commission of some leeway in deciding whether particular offenses should be included in such a general definition. The definition in 18 U.S.C. § 16, as noted previously, is: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Assuming 18 U.S.C. § 16 applies then, the Commission arguably could not disqualify felony offenses that have as an essential element such a use of physical force given Congress' evident concern with the application of force against persons.[15] The Commission also would arguably be disqualified from excluding offenses where an element is an attempt or threat to use force, even though the offense does not, by its nature, involve a substantial risk of the use of such force.[16]

If, however, the Commission was able to isolate certain types of offenses that by their nature do not routinely present a real risk of the use of force -- and do not have as elements the use or attempted or threatened use of force -- the Commission could arguably exclude

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[15] Assuming 18 U.S.C. § 16 applied here, a question might be raised regarding congressional concern with application of force against property.

[16] One risk in trying to carve out a set of "non-violent crimes" from the general class of offenses that have, as an element, the attempted or threatened use of physical force is that the courts would still be bound when applying other statutes that involve the terms "crime of violence" or "violent felony" to treat that set of crimes as "violent" in those contexts. Although, as noted below, the Commission has some flexibility in interpreting its own enabling statute, the courts have less leeway. Confusion may result if a crime is considered a crime of violence under title 18 statutes (including statutory sentencing provisions such as 18 U.S.C. § 924(e)), but not under sentencing guidelines that purport to follow those same title 18 definitions.

such offenses. Such narrowing would be an example of the Commission using its special expertise to achieve its statutory mission to interpret 18 U.S.C. §16(b). See, e.g., Batterton v. Francis, 432 U.S. 416, 424-25 (1977). Indeed, the Commission essentially exercised this expertise in excluding "stale" prior convictions for crimes of violence or drug offenses, even though the statute makes no mention of drawing such a distinction.

Of course, while the Commission could decide to identify and exclude certain offenses that do not routinely involve the risk of force, this exercise may accomplish little to remedy the perceived harshness of the career offender guideline. That is, such a revision would not exclude petty assault cases, since force would have been used. The revision would exclude offenses such as involuntary manslaughter which some consider to be crimes of violence.

2. Does the Language "At or Near the Maximum Term Authorized" Permit the Commission to Create Different Ranges for Career Offenders Who Have Different Types of Qualifying Prior Offenses?

The second question involving interpretation of Congressional intent is whether the Commission can structure the career offender guideline in such a way that career offenders convicted of violating the same instant offense can be sentenced under different ranges if their qualifying prior crimes differ in nature? If so, this would allow the Commission to differentiate, for example, between defendants who had different types and numbers of prior convictions or different periods of time in which they remained "crime free."

The guideline states that the Commission should assure that the guidelines specify a term of imprisonment "at or near the maximum term authorized." The legislative history indicates no intent by Congress to limit the guidelines to one career offender sentence range per instant offense. Such a limitation would derive, if at all, from a narrow construction of the word "near" in the above-quoted sentence. In commenting on a proposed amendment to a previous version of the Sentencing Reform Act, Senator Kennedy noted that the provision would assure that a career criminal "shall receive the maximum or approximately the maximum penalty for the current offense." Sen. Edward Kennedy, 128 Cong. Record 26511 - 512, 26515, 26517 - 518 (Sept. 30, 1982). Thus, if the different ranges all assure that the defendant receives "approximately" the maximum for the instant offense, the statute would be satisfied. It is also worth noting that the guidelines currently allow for different treatment of career offenders convicted of the same offense by making an acceptance of responsibility adjustment available. U.S.S.G. §4B1.1.

Accordingly, the Commission could set out two sentencing ranges for a career offender: one range would be "at" the statutory maximum and would likely be the range presently set out in the guideline. The other range would be "near" the statutory maximum and would be lower than this first range.

Determining what criteria would be used to determine which of the two ranges a defendant received could be difficult. Further, as a policy matter, the Commission would have to determine whether the need for a dual system was sufficient to justify the resulting complexity in the guidelines.

3. Did Congress Express any Intent on Whether Application of a Career Offender Guideline Should be Affected by:

(A) the age of a defendant's qualifying prior convictions;

(B) how close, in time, the defendant's qualifying prior convictions were to each other?

(C) the timing of offenses in terms of intervening convictions?

Finally, the question remains whether Congress intended that the operation of the guideline be affected by factors related to the timing of the prior offenses. One such factor is the recency of the defendant's prior conviction. Indeed, the present guidelines require the existence of two qualifying prior offenses that meet the guidelines' "recency" rule. In providing this standard, the Commission obviously felt that it was not contradicting legislative intent. Indeed, the statements of Senators Kennedy and Biden in the Congressional Record focus on the fact that a small number of defendants are responsible for a significant number of serious offenses and that a career will usually begin between the ages of 16 and 22. (Sen. Edward Kennedy, 128 Congressional Record 26517-518, September 30, 1982; Sen. Joseph Biden, 128 Congressional Record 26570, September 30, 1982). These remarks arguably support the exclusion of defendants with older convictions. See Section V Decay Factor, infra.

Similarly, the Commission might consider a rule that is more lenient toward a defendant whose qualifying prior convictions were close in time to each other (e.g., an aberrant mini-spree). Can the Commission do this?

Again, the statute makes no mention of this scenario and the Senate Report is similarly silent. Whether or not the legislative history speaks to this question, the Commission decided from the beginning that the rule concerning related cases applies to the career offender guideline. Thus, the defendant with a prior conviction for a crime spree will receive credit for only one prior conviction if the multiple crimes were consolidated for sentencing. If these multiple crimes were not so consolidated, the defendant would be credited for more than one conviction, unless the convictions were otherwise construed to be related. The Commission may wish to amend the guidelines to equalize the treatment for these two offenders. If the SRA does not prevent the present use of the "related cases" rule, it should not prohibit an amended rule that achieves consistency between these two offenders.

Finally, the Commission must consider whether the SRA would prevent an amendment of the guidelines that would make the career offender guideline a true recidivist guideline. That is, the present guideline requires that the defendant commit the instant offense subsequent to sustaining at least two qualifying prior offenses. The Commission might wish to amend this guideline to require that the two qualifying prior offenses also be separated by an intervening conviction or arrest. Again, the legislative history does not speak to this issue.

One could argue that Congress knew how to require such timing of offenses when it wished that result,[17] and did not articulate such a standard in 28 U.S.C. This argument would suggest that Congress was interested in the number of incidents of prior qualifying offenses, not the timing of the behavior with regard to convictions. Nevertheless, as noted above, the fact that the Commission has already provided that only one conviction results when qualifying prior offenses satisfy the related cases definition indicates the Commission's earlier belief that it could look to factors other than the number of occurrences of criminal behavior.

C. RELEVANT CASE LAW

1. Downward departures for career offenders

One issue relevant to the career offender guideline is whether downward departures may be justified by any of the reasons discussed in section 4A1.3 (Adequacy of Criminal History Category). That policy statement embodies the Commission's acknowledgment that the criminal history score may under- or over-represent the seriousness of a defendant's criminal history or the likelihood that he will commit further crimes, and that departures may therefore be warranted. It also provides an example of when a downward departure may be warranted.

One district court has held that the rationale of § 4A1.3 cannot be used in the case of a career offender, because the career offender guideline uses mandatory language, the guideline is legislatively required, and the career offender guideline incorporates other parts of chapter 4A, but not § 4A1.3. United States v. Saunders, 743 F.Supp. 444 (E.D. Va. 1990), aff'd, No. 90-5515, 1991 WL 15433 (4th Cir. Aug. 15, 1991). Despite affirming Saunders, the Fourth Circuit has since ruled that a departure on such a ground is possible. United States v. Adkins, 937 F.2d 947 (4th Cir. 1991). Accord, United States v. Brown, 903 F.2d

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[17] See 21 USC § 841(a)(1)(A) to (a)(1)(C) for a sentence enhancement as a result of a prior drug offense, the instant offense must have been committed after the conviction for the prior offense was final.

540 (8th Cir. 1990), and United States v. Hughes, 901 F.2d 830 (10th Cir.), cert. denied, 111 S.Ct. 163 (1990).

On the other hand, three circuits have held that departures based on the relative insignificance of the severity of the instant offense or the prior offenses are improper. United States v. Richardson, 923 F.2d 13 (2d Cir. 1991) (small drug quantity and age of priors were considered by Commission); United States v. Pinckney, 938 F.2d 519 (4th Cir. 1991) (the Commission considered variations of drug quantities in the prior offenses); United States v. Hays, 899 F.2d 515 (6th Cir. 1990) (departure based on quantity of drugs and lack of violence in instant offense is improper). On a related issue, the Seventh Circuit has held that a downward departure for substantial assistance is permitted for a career offender. United States v. Gant, 902 F.2d 570 (7th Cir. 1990).

On this general subject, the Department of Justice recently has requested that the Commission amend the guidelines to prevent a downward departure from career offender status on the ground that the criminal history score overstates the defendant's criminal history.

2. Whether a prior conviction is a "crime of violence"

Another common issue in application of the career offender guideline is how to determine whether an offense is a "crime of violence." Such a determination is important because the guideline applies if the instant offense is a "crime of violence" or a "controlled substance offense," and the defendant has at least two prior convictions for such types of offenses. The commentary to the guideline specifically lists certain offenses that are crimes of violence (these are murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling). U.S.S.G. §4B1.2, comment. (n.2). The guideline also includes offenses that have, as an element of the offense, the "use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. §4B1.2(1)(i). Finally, the guideline includes offenses involving "conduct that presents a serious potential risk of physical injury to another." U.S.S.G. §4B1.2(1)(ii). An application problem has developed concerning this last provision. In particular, the courts have struggled with whether to look beyond the elements of the offense of conviction--either to the language of the charging document or to the manner in which the offense was actually committed--to determine whether the defendant has previously been convicted of a "crime of violence."

Some circuit courts, in analyzing whether the offense of felon in possession of a firearm is a "crime of violence," have shown a willingness to look beyond the elements of the offense, and beyond the manner in which the offense is described in the charging document, to determine whether the defendant's actual conduct presented "a serious potential risk of physical injury to another." These courts have held that if the manner in which the defendant used or possessed the firearm created such a risk, the offense was a

"crime of violence." See, e.g., United States v. Williams, 892 F.2d 296 (3d Cir. 1989) (mere possession is insufficient, but if the defendant fired the firearm he has committed a crime of violence), cert. denied, 110 S.Ct. 3221 (1990); United States v. Thompson, 891 F.2d 507 (4th Cir. 1989) (felon in possession is a crime of violence if the defendant points the firearm at another), cert. denied, 110 S.Ct. 1957 (1990); United States v. Goodman, 914 F.2d 696 (5th Cir. 1990) (felon in possession of a firearm is a crime of violence where there is evidence of an intent to fire the weapon); United States v. Alvarez, 914 F.2d 915 (7th Cir. 1990) (same), cert. denied, 111 S.Ct. 2057 (1991); United States v. Cornelius, 931 F.2d 490 (8th Cir. 1991) (may look to underlying conduct to determine whether defendant's conduct presented a serious potential risk of physical injury); United States v. Walker, 930 F.2d 789 (10th Cir. 1991) (court may consider underlying conduct of defendant). The Ninth Circuit has adopted a categorical approach, holding that this offense is, by its nature, a "crime of violence" due to the inherent serious potential risk of physical injury. United States v. Dunn, 935 F.2d 1053 (9th Cir.), (citing legislative history to 18 U.S.C. § 16), modified, 1991 WL 191645 (9th Cir. Oct 1, 1991) (correcting error unrelated to holding).

The Commission has recently amended the commentary to the career offender guideline (effective November 1, 1991) to address directly the issue whether the conduct underlying an offense may be considered in determining whether that offense is a "crime of violence" for career offender purposes. (USSG § 4B1.2, comment (n.2). The Commission has also explicitly excluded felon in possession of a firearm from the definition of "crime of violence." U.S.S.G. §4B1.2, comment. (n.2). "Under this section, the conduct of which the defendant was convicted is the focus of the inquiry." Id.

In interpreting the prior version, circuit courts have held that the conduct underlying the conviction, even when not part of the charging document, may be examined to determine whether the offense qualifies. This approach operates in both directions. The Seventh Circuit has held that an offense that has an element that would qualify it as a "crime of violence" under section 4B1.2, comment. (n.2), may nonetheless not be a crime of violence if the underlying facts show that physical force was not in fact involved. United States v. Terry, 900 F.2d 1039 (7th Cir. 1990). The D.C. Circuit goes even further by permitting such an inquiry even where the offense is specifically enumerated in the guideline (e.g., robbery). United States v. Butler, 924 F.2d 1124 (D.C. Cir. 1991) (the court may look at the manner the robbery was committed to determine if force was involved); but cf. United States v. Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990) (interpreting Commission's previous definition of "crime of violence"; may not examine underlying facts to disqualify an offense as a "crime of violence"). In the same vein, the Third Circuit has held that a crime that, by its elements, is not a "crime of violence," may become one if the defendant's conduct presented the requisite risk of injury. United States v. John, 936 F.2d 764 (3d Cir. 1991) (larceny). This, of course, is the same line of reasoning that permitted the courts to conclude that felon in possession of a firearm can be a "crime of violence."

The Ninth Circuit takes a different approach, which seems closest in line with the Commission's 1991 version. It does not permit looking beyond the statutory definition of

an offense in determining whether it is a crime of violence. United States v. Becker, 919 F.2d 568 (9th Cir.), cert. denied, 111 S.Ct. 1118 (1991). Furthermore, when a prior conviction was for violation of a general statute that does not distinguish, for purposes of establishing guilt, between committing a crime in a manner that satisfies the "crime of violence" definition and in a manner that does not, it is not a "crime of violence." United States v. Faulkner, 934 F.2d 190 (9th Cir. 1990).

The Commission's new approach does not appear to go quite this far, because it allows examination of the charging document to see if the "conduct set forth" involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another. U.S.S.G. §4B1.2 (n.2) (Nov. 1, 1991).

The Supreme Court has addressed a related issue in the case of Taylor v. United States, 110 S.Ct. 2143 (1990). There the court interpreted language from the "crime of violence" definition in 18 U.S.C. § 924(e) (Armed Career Criminal). (The definition of "crime of violence" in the career offender guideline is derived from section 924(e). U.S.S.G. App. C (Amendment 268)). In particular, the Court decided that the word "burglary" was meant to be a universal one applied equally across the country, regardless of how each state defines the term in its criminal code. The Supreme Court directed that in determining whether an offense fits this universal definition of burglary -- unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime -- lower courts must use a categorical approach, rather than looking at the facts underlying the conviction. That is, a court may look only at the statutory definition of the prior offense, or in those cases where a general statute may be violated in two or more specific ways the court can examine the charging document and jury instructions to see if the defendant was only charged with a burglary or if the jury necessarily had to find all of the elements of a burglary to convict. This rule presumably applies beyond the part of the definition of "crime of violence" dealing with burglary.[18]

With these various approaches in mind, a brief summary of what types of offenses have been included and excluded from the "crime of violence" definition is in order. At least two courts have held that larceny can be a "crime of violence." United States v. McVicar, 907 F.2d 1 (1st Cir. 1990) (Tennessee's larceny from a person statute qualifies

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[18]In footnote 9, the Court noted that it was only dealing with whether offenses should count as "burglaries" for enhancement purposes, and that the government remains free to argue that an offense should count toward enhancement on the basis that it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Despite this limitation of the holding, the three reasons for applying a categorical approach to determining whether an offense is a burglary -- the general language of section 924(e), the legislative history, and the practical difficulties and potential unfairness of a factual approach -- apply equally to determining whether an offense otherwise involves conduct that presents a serious potential risk of physical injury to another.

under any approach, including the categorical one, because it requires the larceny to be directly from the person); United States v. John, 936 F.2d 764 (3d Cir. 1991) (examining underlying facts under the "serious potential risk of physical injury" prong). The Ninth Circuit, following the categorical approach, has included **involuntary manslaughter** as a qualifying prior crime in the context of 18 U.S.C. § 924(c) (using or carrying a gun during and in relation to a crime of violence). United States v. Springfield, 829 F.2d 860 (9th Cir. 1987). Three circuits have included various **"threatening communications"** statutes. United States v. Leavitt, 925 F.2d 516 (1st Cir. 1991) (state offense of "high and aggravated oral threatening"; court looked at the facts as alleged in the indictment); United States v. Poff, 926 F.2d 588 (7th Cir. 1991) (en banc) (categorical approach to "threatening the life of the President"); United States v. Left Hand Bull, 901 F.2d 647 (8th Cir. 1990) (categorical approach to "mailing a threatening communication").

Robberies are specifically mentioned in the commentary to the career offender guideline as "included" offenses. The courts have routinely held that they are indeed included, although not all courts have clearly indicated whether they would be excluded in certain circumstances. See, e.g., United States v. Davis, 915 F.2d 132 (4th Cir. 1990) (analyzing the prior offense under a fact-specific and a categorical approach and concluding that it fits under either); United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989) (same).

D. EMPIRICAL FINDINGS

In examining whether the career offender guideline follows the original intent of the Commission and Congress, one of the specific issues raised was: Is the guideline "narrow" enough in excluding offenders whose qualifying convictions (qualifying prior and instant) are for trivial violent and/or controlled substance offenses?

The Monitoring data base of approximately 30,000 guideline cases sentenced in FY90 was used to generate a sample to study the question of narrowing the range of applicable career offender cases. Actual research findings for this question will be described in the next section.

Methodology:

A 50 percent random sample of all career offender cases was selected, reviewed, and analyzed, to study the offense characteristics and criminal history of the defendant. Specifically, the qualifying prior convictions were analyzed in terms of offense components, type, and severity, in addition to the instant conviction, guideline application, sentence, departure, etc.

Findings:

In the Monitoring data base of guideline cases for fiscal year 1990, 653 cases of career offenders were identified. A 50 percent random sample of these was generated for case review and analysis with the aid of a detailed coding instrument.[19] The following initial analysis is based on the 327 sampled files, and combines information from both the case reviews and precoded monitoring items.[20] The coding instrument for sample cases, and Tables 31-50 reporting on findings pertaining to the "narrowing factors" question, are in Appendix B-C.

General Sample Characteristics:

Offense Behavior:

The most common type of instant offense type is controlled substance violations (57.4%), followed by robberies (31.4%). Some form of weapon, force, or threat of force is used in over 40 percent of the actual conduct of these crimes, or as a part of their generic component (see Table 31).

Less than half of the cases are single criminal acts, with nearly 30 percent of them constituting part of some ongoing criminal activity (see Table 32). Concomitantly, in more than half the cases the offender was involved with other codefendants or participants, playing relatively more culpable roles in the offense (see Table 33). The same direction of findings is indicated when analyzing offenders' specific roles in the 170 available drug offenses (see Table 34).

Criminal History:

Tables 35 to 39 detail the sample offenders' prior conviction history for violent or controlled substance offenses, from their first (oldest) to their last (most current) conviction (up to 5). Drugs, robberies, and burglaries are invariably the most common convictions (see Tables 35 and 36). It is interesting to note that one-third of the sample had no more than two qualifying prior convictions (see Table 37). The convictions are also characterized by

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[19] See Appendix B for the coding instrument: "Career Offender Case File Summary: Narrowing Factors."

[20] The total number of cases included in the various tables may vary due to the exclusion of cases for which one or more of the variables analyzed was missing. In addition, for variables drawn from the FPSSIS files data were no longer available for approximately the last month of FY90.

a high incidence of force used in various forms (weapons, force, or threat of force) in these prior offenses.

The offenders in the sample show a high rate of recidivism, when defined by the number of prior adult convictions, including felonies and misdemeanors, with all "stale" convictions counted as well (see Table 40). The first quartile is three prior convictions, the median is five, and the third quartile is eight.

The most frequent sentence length that sample offenders have had for prior convictions is one to five years, but over 60 percent of the offenders received at least one term over five years, with 80 percent having at least three terms of over five years (see Table 41). More than half of the offenders have at least two instances in which their probation or parole has been revoked (see Table 42). Finally, this sample of career offenders has been free, on the average, for 21 months prior to their instant offense (with the first quartile 6 months, the third quartile 61 months free).

Case Processing:

Almost half of the offenders in the sample were convicted of multi-count cases (see Table 43). Trial is the mode of conviction in 37 percent of the cases, considerably higher than the proportion in the entire guideline population, reflecting the seriousness of career offender cases (see Table 44).

Thirteen percent of the offenders received two or more points for aggravating role in the offense, with only 2 percent receiving point-reductions for mitigating roles. Four percent of the cases were given 1-5 point enhancements for some level of victim injury. Weapon enhancements were imposed in 3.3 percent of the drug violations, and in 10.3 percent of the robberies.

The difference between the original, instant-offense guideline offense level of these cases, and the enhanced offense levels recalculated based on the career offender Guideline are considerable (see Table 45). Perhaps this difference becomes more apparent by comparing the points of offense levels describing the three sample quartiles: 25 percent of the cases are below and 75 percent above ("first quartile") offense level 18 before, and level 30 after career offender application; 50 percent of the cases are below and 50 percent above ("second quartile" or "median") offense level 24 before and level 32 after; and 75 percent of the cases are below and 25 percent above ("third quartile") offense level 30 before and level 35 after. Judges, perhaps as a consequence, tend to depart more often in career offender cases, usually with a departure downward from the guideline range minimum (see Table 46).

The actual sentences imposed are detailed in Table 47. Again, the first quartile point is a 125 months term, the second quartile (or median) is 210 months, and the third quartile is 292 months.

Offender Characteristics:

Virtually all (98%) of the cases processed as career offenders involve male offenders, (see Table 48), with 48.6 percent being Black and 40.1 percent being white (see Table 49). Finally, in clear correlation with the sheer volume and length of their criminal careers, these offenders are on the average older (with a median age of 36) than the general population of guideline cases (see Table 50).

Sample Case Review and Content Analysis

The case review of the over 300 career offender cases is still proceeding, with a painstaking legal analysis of issues such as the exact nature, severity, statutory status (i.e., State definition of the particular violation as a felony or misdemeanor) and penalty ranges of qualifying priors; the possible application of actual offense components instead of elements of the convicted offense; questions about acceptance of responsibility; ratcheting,[21] etc.

First results seem to indicate more of a problem with definitional issues, interpretations and applications of the guideline than a need to amend it. Beyond this initial phase, however, there is a clear need for more indepth acquaintance with the specifics of these complex cases before any final analysis, conclusions, and recommendations can be presented to the Commission.

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[21] "Ratcheting" in this context occurs when the offender is convicted under a penalty enhancement statute (e.g., 21 U.S.C. § 841(a) (enhancement for prior drug conviction); 18 U.S.C. § 924(e) (enhancement for felons in possession of firearms with prior violent or drug crimes), and where the enhanced statutory maximum, instead of the unenhanced maximum, is used in calculating the career offender guideline.

E. OPTIONS

The following options for narrowing factors might be considered:

Option 1(a):

Identify and exclude categories of offenses that are considered to be "lesser" crimes of violence, even though they have as an element the use or threatened use of force (e.g., non-aggravated assault and/or battery, extortion, threatening communications).

Policy Considerations: The Commissions must determine whether the exclusion of offenses that otherwise meet the statutory definition of a crime of violence is permissible, given 28 U.S.C. § 994(h). Second, if it does decide to exclude specified "lesser" crimes of violence, the Commission must determine whether it wishes to apply this exclusion to cases in which the instant offense is one of those lesser offenses. For example, if the instant offense is a"lesser" crime, it frequently will have a lower statutory maximum penalty anyway--e.g., threatening communications offense- 5 year statutory maximum--such that with the existence of two qualifying prior crimes, whether "lesser" or otherwise, a sentence at or near this lower statutory maximum penalty might be considered appropriate. In contrast, where the instant crime is an offense with a higher statutory maximum--e.g., a drug offense with a 20 year statutory maximum penalty--the use of two "lesser" qualifying prior offenses to trigger career offender status frequently results in a sentence that may appear to be unduly harsh.

Advantages: Could prevent unduly harsh sentences for more trivial crimes of violence. Could prevent courts from departing, with predictably disparate results, when these courts feel that the career offender status is inappropriate. Conversely, inasmuch as some courts are already departing on the ground of overstatement of the seriousness of the criminal history, this amendment would accord similar treatment to offenders whose sentencing court may not choose to depart.

Disadvantages: Identifying "lesser" crimes of violence, either generically or specifically, could be difficult. Further, certain offenses with an element involving force are broad enough to include truly minor, as well as truly serious offenses, particularly where a particular statute is used as a plea statute for more serious offenses.

Option 1(b):

Exclude categories of offenses where the mens rea element is negligence, recklessness, or the like. Offenses excluded might include involuntary manslaughter or

vehicular manslaughter (typically in connection with driving under the influence of alcohol or controlled substances).

Policy considerations: Presumably, few would argue that this amendment contravenes Congressional intent. While crimes such as vehicular homicide arguably fit the definition of crime of violence, it is highly unlikely that Congress envisioned these types of offenses when it referred to crimes of violence.

Option 2:

Exclude the use of two "lesser" prior offenses (e.g., assaults, threatening communications) in determining career offender status. (The above options eliminate the use of any of the lesser offenses.) Similar to the options above, this option prevents the more unjust, if more unusual, situation where a person becomes a career offender solely on the basis of two "lesser" offenses (e.g., two barroom brawls).

Option 3:

Modify the career offender ranges based on statutory maxima so that "serious" instant or prior crimes of violence receive guideline ranges "at the statutory maximum" and "lesser" instant or prior crimes of violence receive guideline ranges "near the statutory maximum" -- that is, at a lower level than the more serious offenses.

Similar to Options 1 and 2, this amendment would identify offenses that are "lesser." However, instead of not counting such offenses at all, the offenses would be punished somewhat less severely with a lower offense level than more serious offenses. Such an approach requires a belief that 28 U.S.C. § 994(h)'s "at or near the statutory maximum" permits two separate ranges to be applied -- one at the maximum, and one near the maximum.

Policy Considerations: As noted in Option 1, the Commission would have to determine whether it wished to treat "lesser" instant offenses with a low statutory max (e.g., threatening communication, with a 5 year statutory maximum where the two qualifying prior offenses are armed bank robberies) the same as cases in which the qualifying prior crimes are "lesser" or in which the instant crime is "lesser" (minimal participant in drug deal; 20 year statutory max), but the statutory max is great.

Advantages: This amendment would clearly comport with the Congressional mandate of sentences "at or near" the statutory maximum. It would better calibrate the career offender guideline.

Disadvantages: Again, identifying "lesser" crimes of violence would be difficult. Moreover, determining the offense level and/ or criminal history category of a career offender whose sentence should be only "near" the statutory maximum level would necessarily be arbitrary.

Option 4(a):

Restrict "crime of violence" by modifying the definition of "felony" conviction to include only those felonies so designated by the State in which the offense was convicted.

Advantages: Arguably, looking to a state's classification of an offense as a felony or a misdemeanor, instead of looking to whether the state has set a maximum penalty of more than one year, reveals more about the seriousness of that offense. This option might improve ease of application, since the probation officer would need to review only the state designation of the offense, although it is may well be no more difficult to determine the maximum penalty for a particular offense than it is to determine the label that a State places on it.

Disadvantages: The Commission thrashed this issue out when it originally promulgated the guidelines and apparently decided that use of State labels could create disparity among offenders with similar criminal histories. That is, state definitions of felonies vary widely, with some states considering serious offenses to be only misdemeanors, even though the statutory maximum may be as high as 5 years and the conduct involved may be quite serious (e.g., some drug offenses in some Southern states).

Option 4(b):

Restrict "crime of violence" by modifying the definition of "felony" conviction to include only those offenses with statutory maxima greater than [two] years and a day.

Policy considerations: Further study is necessary in order to determine whether this change would constitute any improvement in the present guideline; that is, are there enough "lesser" qualifying prior crimes that would be included by the present "one year and one month" statutory maximum definition, but excluded by a definition of felony calling for a two year statutory maximum to justify the change. Moreover, research is necessary to determine whether more serious qualifying prior crimes are included in statutes with statutory maxima of two years.

Advantages: Similar to Option 4(a), this approach avoids resort to State labels that may not accurately reflect the seriousness of the offense.

Option 5(a):

Modify the requisite sequence requirement in §4B1.2(3) to require that the prior offenses occur in a strictly consecutive sequence (e.g., prior offense number 1; arrest, conviction, or sentence; prior offense number 2; arrest, conviction, sentence; commission of instant offense). Departures in the case of numerous armed robberies, rapes, and serious violent crimes, not otherwise counted under the modified rule, might be allowable.

Policy considerations: In requiring that each qualifying prior offense be separated by a contact with the criminal justice system, this revision causes the career offender provision to resemble more closely a true recidivist statute. This revision would narrow not the **type** of crime of violence considered, but the **number** of such offenses that could be counted. The Commission would have to consider whether such an amendment would comport with Congressional intent, although the Commission's refusal to count "related" qualifying prior offenses in the present guidelines suggests that the Commission has already determined that such a restriction on the timing of qualifying prior offenses is permissible. Further study is necessary to determine how many offenders who are presently classified as career offenders would be excluded by this approach.

Advantages: This approach would exclude double counting, for career offender purposes, of multiple "lesser" offenses or of offenses that by their nature are sometimes committed on multiple occasions in a short period of time; e.g., multiple burglaries, multiple sales of a small quantity of drugs.

Disadvantages: Some offenses may be so serious--e.g., armed robbery, rape, murder--that the multiple commission of these offenses may warrant career offender status, notwithstanding the absence of an intervening contact with the law. For this reason, a departure for such offenses that would otherwise be counted as only one qualifying prior conviction might be necessary.

Option 5(b):

Expand the requirement that the two prior offenses must **not** be related to provide that even if the offenses are not related--for example,consolidated for trial or sentence-- they should be counted as only one prior conviction if they could properly have been consolidated for trial; that is, joinable offenses under F.R. Crim. P. 8(a).

Advantages: Like 5(a), this option would prevent counting as more than one conviction, multiple qualifying prior crimes that are **not** separated by a contact with the criminal justice system (arrest, conviction, or sentence) and that **could have been properly consolidated by trial.** The result removes the disparity of treatment that presently exists as a result of the fortuity of whether the offender was sentenced in one jurisdiction or multiple jurisdictions. Less far sweeping a change than 5(a), however, this provision would still count

as two qualifying prior offenses two convictions for different types of crimes, or non-joinable offenses. Thus, under 5(a), a prior bank robbery and rape that are not separated by an arrest/conviction would count as only one conviction. Under 5(b), these two offenses would not be joinable under Rule 8(a) and thus would count as two prior offenses.

Disadvantages: As noted above, multiple occurrences of particularly serious qualifying prior offenses--e.g., armed robbery, rape--whether or not properly joinable might warrant career offender treatment, given Congressional statements that multiple serious offenses committed by youthful offenders represented a large part of the violent crime in our country. An upward departure for such offenses might be necessary. Application concerns: courts are generally not required to rule on Rule 8(a) questions and this requirement will give them a new rule to learn.

V. CAREER OFFENDER -- MODIFYING THE DECAY FACTOR

A. INTRODUCTION

In drafting the guideline provisions governing career offenders, the Commission employed the same "decay factor" that is used in calculating criminal history, generally. Specifically, with regard to qualifying prior offenses for which the defendant received a sentence of more than one (1) year and one (1) month, the defendant must have served part of his sentence for that offense within fifteen (15) years of the commission of the instant offense in order for the prior offense to count as a qualifying prior offense for the purpose of determining career offender status. For a prior offense in which the sentence was less than one year and one month incarceration, the defendant must have committed the instant offense within ten (10) years of imposition of that prior sentence.[22]

In recent years, some have suggested that the existence of a decay factor in determining career offender status is illogical; that is, if an individual has truly made a career out of crime, one might expect that at least one of his qualifying prior crimes might lie outside the ten- or fifteen-year time limit imposed by the decay factor. Yet, notwithstanding a life of crime, this person is not considered a career offender because of the decay factor. Furthermore, it has been noted that the statutory directive makes no mention of a decay factor -- nor do other statutory enhancements, including the Armed Career Criminal Act. It is this criticism that has prompted the Working Group's present study.

B. RELEVANT LEGISLATIVE HISTORY

See discussion, supra, at Subsection B of Section IV (Career Offender -- Narrowing the Qualifying Prior Crimes).

C. RELEVANT CASE LAW

Relevant Sequence and Timing Issues

A relevant issue in the application of the career offender guideline is whether the **sentencing for both** of the qualifying prior convictions, as opposed to the conviction, alone must pre-date the commission of the instant offense. Under U.S.S.G. §4B1.2(3), (the guideline applies if the defendant **committed the instant offense subsequent to sustaining** at least two prior felony convictions of either a crime of violence or a controlled substance

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[22] See U.S.S.G. §4B1.2, comment. (n.4); §4A1.2(e).

offense; the date that a conviction is sustained is the date on which the judgment of conviction was entered. Obviously, the date of entry of the judgment will be later than the date of conviction and will be no sooner than the date of sentencing, although if the court formally enters the judgment several days after sentencing, as some courts do, the date on which a conviction is sustained will be **later** than the date of sentencing.

Indeed in United States v. Bassil, 932 F.2d 342 (4th Cir. 1991), the Fourth Circuit ruled that the defendant was not a career offender, even though he had been convicted of his second prior offense before committing the instant offense, because the defendant had not been sentenced before commission of the instant offense, inasmuch as he had escaped prison after the second conviction, but before sentencing on it.[23] See also United States v. Belton, 890 F.2d 9 (7th Cir. 1989) (the career offender guidelines applies to a defendant convicted of the second qualifying prior offense **during** the time he committed the instant offense, a conspiracy, because part of the instant offense was committed after the second prior conviction).

Accordingly, to avoid the unintended result that would occur in situations such as that found in Bassil, the Commission might want to amend its definition of the "date a conviction is sustained." [24]

A related question is whether the conviction (i.e., sentencing) for the first qualifying prior offense must take place before commission of the second qualifying prior offense. In other words, it is clear that the career offender guideline applies to a defendant whose prior history occurs in the following sequence: commission of bank robbery, conviction for the bank robbery, commission of drug distribution offense, conviction for the drug distribution, commission of instant offense. But does the guideline also apply to a defendant whose prior history occurs in this sequence: commission of bank robbery, commission of drug distribution offense, conviction for the bank robbery, (separate and unrelated) conviction for the drug distribution, commission of instant offense?

The Second Circuit has held that the guideline does apply to the second scenario as well. United States v. Chartier, 933 F.2d 111 (2d Cir. 1991). This is consistent with the courts' application of the Armed Career Criminal statute. United States v. Anderson, 921 F.2d 335 (1st Cir. 1990); United States v. Schoolcraft, 879 F.2d 64 (3d Cir.), cert. denied, 110

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[23] The court did note the possibility of an upward departure on these facts.

[24] Inasmuch as the Commission amended §4A1.2 in the 1991 amendments to provide that prior cases are not related if they were separated by an arrest, it may wish to make the date of the arrest, as opposed to the formal date that a conviction is entered onto the docket, the pivotal date in determining whether the prior convictions satisfy the appropriate sequence.

S.Ct. 546 (1990); but see United States v. Balascsak, 873 F.2d 673 (3d Cir.) (third qualifying prior offense must follow convictions for the first two qualifying priors), cert. denied, 111 S.Ct. 173 (1990). No circuit has held that a prior qualifying prior offense is excluded on the basis that it occurred too soon after the other qualifying prior.

The career offender guideline has a built-in measure of protection in this area by requiring that the convictions be counted separately under chapter 4A before qualifying as separate qualifying prior offenses. U.S.S.G. §4B1.2(3)(B). Nonetheless, some courts have permitted downward departures on the ground that the career criminal's "career" was brief. See, e.g., United States v. Smith, 909 F.2d 1164 (8th Cir. 1990), cert. denied, 111 S.Ct. 691 (1991) (the length and scope of the career are appropriate grounds for either an upward or downward departure from the career offender guideline range); United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991) (closeness in time of prior convictions to each other, when combined with other factors, justifies departure).

Use of "Stale" Convictions to Depart Upward

Another issue that relates to possible amendments to the career offender guideline is whether "stale" convictions (i.e., those that are too old to be counted under the guidelines) are valid bases for upward departures. In a number of cases, the courts have permitted such departures. United States v. Gardner, 905 F.2d 1432 (10th Cir.) (departure to bottom of range that would have applied if defendant was a career offender based on two "stale" bank robbery convictions plus more recent firearms offenses), cert. denied, 111 S.Ct. 202 (1990); United States v. Lang, 898 F.2d 1378 (8th Cir. 1990); United States v. Cota-Guerrero, 907 F.2d 87 (9th Cir. 1990) (number and similarity of "stale" priors shows propensity for violence); United States v. Aymelek, 926 F.2d 64 (1st Cir. 1991) (number and dangerousness of "stale" priors justifies departure); United States v. Russell, 905 F.2d 1439 (10th Cir. 1990) ("stale" priors were "reliable information" under §4A1.3 justifying upward departure, in light of fact that defendant spent eleven of the prior fifteen years in jail and had routinely committed a new offense shortly after being released from prison). Such a basis for departure is limited in the Ninth Circuit to those prior offenses that are similar to the instant offense. United States v. Leake, 908 F.2d 550 (9th Cir. 1990).

The Sixth Circuit has sent conflicting signals on this issue. It has held that an upward departure on the basis of a "stale" conviction was an arbitrary change in the requirements for career offender status, United States v. Robison, 904 F.2d 365 (6th Cir. 1990), cert. denied, 111 S.Ct. 360 (1990), and it has also held that a departure upward to the career offender range is allowed where consolidation of two prior drug convictions prevented use of the career offender guideline.

D. EMPIRICAL FINDINGS

The Working Group examined empirically the possible elimination of the decay factor in counting qualifying prior offenses for career offender status. The Monitoring data base of approximately 30,000 FY90 guideline cases was used for studying this question.

Methodology:

A random sample of 600 cases was selected from all cases with a qualifying instant offense, an indication of some prior criminal behavior, and a defendant aged 28 or older, to study the effect no decay factor would have on applying the career offender guideline. Specifically, the cases were reviewed to identify qualifying prior convictions that are not counted under the current decay specifications of the guideline, but could qualify the case as a career offender case if the decay factor was eliminated. The survey instrument for case review of the sample examining "decay factor" questions is in Appendix B-D.

Chart I follows the case review of sample cases. Eleven percent (64 defendants) were sentenced as career offenders, with another set of cases possibly eligible under the guideline in its present form. From the documents available, there were 15 additional cases that seemed to qualify as career offenders with no decay factor applied to the guideline. Some issues, relating to a number of violent and drug offenses, need further clarification before the qualification of certain other cases, with or without the decay factor, can be determined.

Based on the 15 cases unambiguously identified in the sample to qualify as career offenders if the decay factor were abolished, the best point estimate is that an additional 2.5 percent of the affected population (i.e., drug and violent offenders over 27 with some criminal history) could become career offenders. Based on FY90 figures, this would generate 168 more career offender cases. (For the technique used in the estimation, see Appendix B-D.)

E. OPTIONS

Option 1(a):

Eliminate entirely the requirement that convictions for career offender qualifying prior offenses occur within certain time periods; that is, abolish the decay factor for purposes of determining career offender status.

Implications: The existence of stale prior convictions may have little relevance to whether an offender is likely to recidivate, or commit serious offenses in the future, particularly where the enhancement in sentence is as dramatic as that required by the career

CHART I

PRELIMINARY

SUMMARY OF CASE FILES
DECAY FACTOR REVIEW

Number of Case Files Involved:

Number of FY1990 Offenders:	29,011 cases
Number of Drug Offenders, Over Age 27, with some criminal history:	5,559 cases
Number of Violent Offenders, Over Age 27, with some criminal history:	1,148 cases

Number of Case Files Reviewed:

Number of Drug Offender Files Identified (Random Sample):	350 cases
Number of Violent Offender Files Identified (Random Sample):	250 cases
TOTAL FILES PULLED, SUMMARIZED, QC'ED:	**590 cases**

Case Files Screened Out:

Insufficient COV/CSO Priors:	**425 cases (71%)**
(Includes cases with 0 or 1 qualifying prior convictions for COV/CSO -- including prior convictions that definitely are or might possibly qualify (e.g., commercial burglary, involuntary manslaughter, assault, etc.)	
Defendant Sentenced as Career Offender:	**64 cases (11%)**
Instant Offense Is Not a COV/CSO:	**11 cases (2%)**
(Includes cases with any number of qualifying prior convictions for COV/CSO, but an instant offense that is not a COV/CSO)	
TOTAL SCREENED OUT:	**500 cases**

Potential Career Offender Without Changing Decay Factor:

Qualify as Career Offender, But Not Sentenced as Career Offender: **12 cases (2%)**

* already has 2 or more qualifying, felony priors
* may have decayed priors, but none needed to make career offender
* no changes in COV/CSO definition required
* not actually sentenced as career offender

(includes 1 att. sexual battery, 1 DWI manslaughter)

Would Qualify as Career Offender If We Knew the Assault/Battery Was a Felony or If We Knew the Burglary Was Residential: **19 cases (3%)**

* no decayed prior needed to make 2 or more priors
* need to research the felony nature of an A/B or threatening communications prior (14 cases) or residential nature of a burglary prior (5 cases) to determine if they qualify under existing rules

Would Qualify as Career Offender If Commercial Burglary and Felony Drug Possession Rules Were Changed: **18 cases (3%)**

* no decayed prior needed to make 2 or more priors
* need to change COV/CSO definition to include commercial burglary (7 cases) and felony drug possession (11 cases)
* could only be a career offender if this factor were changed

TOTAL CAREER OFFENDER REGARDLESS OF DECAY FACTOR CHANGE: **49 cases (8%)**

Potential Career Offender If Decay Factor Modified:

Would Qualify as Career Offender If No Decay: **15 cases (2%)**

* decayed prior needed to make 2 or more priors
* no changes in COV/CSO definition required

(includes 3 non-aggravated assaults, 1 manslaughter)

Would Qualify as Career Offender If No Decay and If We Knew the Assault/Battery Was a Felony or If We Knew the Burglary Was Residential: **19 cases (3%)**

* decayed prior needed to make 2 or more priors
* need to research the felony nature of an A/B prior (8 cases) or residential nature of a burglary prior (11 cases) to determine if they qualify under existing rules

Would Qualify as Career Offender If No Decay and If Commercial Burglary and Felony Drug Possession Rules Were Changed: **7 cases (1%)**

* decayed prior needed to make 2 or more priors
* need to change COV/CSO definition to include commercial burglary (4 cases) and felony drug possession (3 cases)

TOTAL QUALIFYING WITH DECAY MODIFICATIONS: **41 cases (7%)**

offender statute. Indeed, it may seem "unjust" to punish as a career offender an offender who has led a law-abiding life for a lengthy period of time, following earlier convictions. Nevertheless, stale prior convictions are in fact part of the offender's career, may be relevant indicators of recidivism, and may have been intended by Congress (see section B on Relevant Legislative History, supra). Finally, with respect to application of the new provisions, the absence of a decay factor would technically render the career offender provision simpler to apply, but complication in application of the guidelines overall would occur since different rules would be used when counting qualifying prior career offender crimes, than would be used when counting criminal history points.

Option 1(b):

Eliminate the decay factor for purposes of calculating both career offender status and criminal history points, generally.

Implications: Similar to those above. If the decay factor were eliminated for purposes of calculating career offender status, where the ramifications are enormous, it makes little sense to keep a decay factor for purposes of calculating criminal history points, where the ramifications on a sentence are much milder; that is counting a stale conviction will never raise a defendant's category more than one level. While elimination of the decay factor across the board would create more uniformity in application than elimination of it for just one kind of calculations, its elimination would radically change the theoretical and practical underpinnings of the current system.

Option 2(a):

Construct a new decay factor based on some "crime free period," following which period prior offenses would not be counted for purposes of the career offender provisions. "Crime free period" might be defined variously as a period without arrest, without conviction, without conviction for a felony, without conviction for a "serious offense." The period might run variously from sentencing on the last offense to commission or conviction on the subsequent offense. The new applicable time period might also be applied to counting criminal history points.

Implications: Complications involved in application of such a new system might be considerable. Lack of uniformity with the criminal history rules for counting prior convictions would add to complexity of the guidelines. Some notion, however, of crime free periods might more faithfully represent likelihood of recidivism, or other relevant criminal history factors. Additional implications arise where the applicable time period for career offenders differs from that applicable to counting criminal history points. Accordingly, if the Commission preferred a revised decay factor that focused on a particular period of time in

which the defendant had been "crime free," the Commission would have to decide whether to use that revised decay factor for calculating criminal history generally.

Option 2(b):

Apply this revised decay factor to calculation for both criminal history points and career offender status.

Implications: See above discussion following Option 2(a).

Option 3:

Alter the application of the decay factor such that an offender can be exempted from career offender status only if both of his qualifying prior crimes occurred outside the relevant time period prescribed by the decay factor.

Implications: This amendment would have a similar impact to that of Option 2, without the complexity of that option, without requiring the drafting of a revised decay factor, and without creating any of the conflicts with use of the decay factor for the calculation of criminal history points that Option 2 would create. It would have some of the disadvantages of Option 1, however, and its specific ramifications would have to be studied further.

Option 4:

Modify §4A1.2(e) (applicable time period) so that the ten- and fifteen-year period follows not release from incarceration, but expiration of parole.

Implications: Modification would reduce the need for a complete elimination of decay factor and the attendant negative implications of such an elimination, while permitting some of the positive implications, all of which are outlined above.

Option 5:

Modify §4B1.2(3) (definition of "prior felony conviction") so that a prior conviction is counted as of the date of conviction, or as of the date of arrest, and not the date of sentencing.

Implications: modification would reduce the need for a complete elimination of decay factor and the attendant negative implications of such an elimination, while permitting

some of the positive implications, all of which are detailed above. The result in U.S. v. Bassil would also be tempered (see Subsection C on Relevant Case Law, supra). This would, of course, represent a modification of the standard understanding of conviction as requiring the entry of judgment as well as sentencing. Additional defendants likely would be considered career offenders under this expanded definition of "prior conviction."

VI. CAREER OFFENDER -- CLARIFICATION OF APPLICATION

A. INTRODUCTION

In light of the complex, and at times problematic, nature of the definitions involved in and the application of the Career Offender Guideline, this section recommends options for the Commission to consider in order to address some of the issues in the application of 4B1.1. Many of the changes can be made without an amendment to the career offender guideline -- many options involve additional training of court officers, or commentary change. (Indeed, a considerable number of hotline calls request information regarding the proper application of the career offender guideline, as noted below.) In light of the severe sentences required to be imposed pursuant to 28 U.S.C. § 994(h), clarification of the appropriate application of the career offender guideline may be particularly indicated.

B. RELEVANT CASE LAW

One of the application questions relevant to the career offender guideline involves the Federal Youth Corrections Act (Y.C.A.), which was enacted in 1950 and repealed in 1984 (as part of the Comprehensive Crime Control Act of 1984). While it was in effect, the Y.C.A. provided the courts with an added degree of flexibility in dealing with young offenders. The courts could commit the offender to the custody of the Attorney General for institutional treatment and rehabilitation under the Act, which in turn afforded the Attorney General a broad range of discretion in providing institutional treatment. The courts could also place a youthful offender on probation, or it could sentence him according to any of the penalty provisions applicable to adult offenders. See Tuten v. United States, 460 U.S. 660, 663-64. A major advantage to the offender is that the Act provided avenues for him to obtain a certificate setting aside his conviction. 18 U.S.C. § 5021. If he was unconditionally discharged from prison before the expiration of his term, the conviction would be "automatically set aside." 18 U.S.C. § 5021(a). If he was sentenced to a term of probation and unconditionally discharged before that term expired, the conviction in that case would also be "automatically set aside." 18 U.S.C. § 5012(b). Prior convictions that were sentenced pursuant to the Y.C.A. raise two issues under the criminal history guidelines. The first issue was addressed by the Commission in the last amendment cycle. This issue was whether a Y.C.A. sentence is an "adult" conviction under the career offender guideline. U.S.S.G. §4B1.2, comment. (n.3). Under the amendment, any conviction for an offense committed at age eighteen or older is an adult conviction. Id. Virtually all defendants sentenced under the Act will have been over age eighteen. See Tuten, 460 U.S. at 663 n.3. For those under the age of eighteen, the commentary indicates that if the defendant was proceeded against as an adult, then the conviction counts as an adult conviction. U.S.S.G. §4B1.2, comment. (n.3). All defendants who go to trial in federal court are proceeded against as adults, because those not proceeded against as adults are surrendered to state authorities. 18 U.S.C. § 5032. There does remain a second issue, though, which is whether

a conviction "set aside" under the Act is excluded from the criminal history score on the ground that it is an "expunged" conviction. See U.S.S.G. §4A1.2(j) ("Sentences for expunged convictions are not counted . . . ."). This affects calculation of the criminal history score, in general, as well as the operation of career offender guideline (which only counts prior convictions that would otherwise be counted in the criminal history score). Although the guideline appears to direct the counting of prior Y.C.A. convictions, the issue is unclear.

> The commentary to section 4A1.2, at application note 10, states:
> A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

Thus, the language of the guideline and the commentary draw a distinction between convictions that are "set aside" and those that are "expunged." A Y.C.A. "set aside" appears to fit the guideline's definition of "set aside," both in name and effect. When a conviction is set aside under the Y.C.A., it is for reasons unrelated to innocence or errors in law. The purpose is to restore civil rights and remove the stigma associated with a criminal conviction. Tuten, 460 U.S. at 664-65. The defendant will have been duly convicted, and the set aside takes place without any re-examination of the legality of the conviction. See 18 U.S.C. § 5021.[25]

Nonetheless, the last sentence of the commentary and the sole sentence of the guideline itself -- both of which state that "expunged" convictions do not count -- complicate the issue, because some courts (including the Supreme Court) have referred to the Y.C.A.'s "set aside" provisions as "expungement" provisions.

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[25]This is consistent with the fact the guidelines count a prior "diversionary disposition," where there was an admission or finding of guilt, even though there was no conviction. U.S.S.G. §4A1.2(f), & comment. (n.9). During the time the Y.C.A. was in effect, diversionary dispositions undoubtedly were given to defendants whose offenses or prior records were less serious than those prosecuted and sentenced under the Y.C.A. A defendant facing the prospect of prosecution and sentencing under the Y.C.A. would have preferred a diversionary disposition. Therefore, it would be incongruous to treat a prior diversionary disposition (which is made available for less serious offenses committed by less serious offenders) more severely than a prior Y.C.A. conviction. Furthermore, a diversionary disposition is counted because it "reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency." That same reasoning applies to a defendant sentenced under the Y.C.A.

In United States v. Hidalgo, 932 F.2d 805 (9th Cir. 1991), the Ninth Circuit held that a prior state conviction that was "set aside" under state law was "expunged" as that term is used in section 4A1.2(j), and thus that prior conviction was not used in determining the defendant's criminal history score. The court criticized the language of the commentary (application note 10) as confusing and "somewhat internally contradictory." Id. 932 F.2d at 807. In deciding whether the state conviction had been "expunged," the court first looked to the Y.C.A. as a "useful analogy." Because the Supreme Court has referred to the Y.C.A. set aside provision as an expungement provision, the Ninth Circuit determined that the guidelines would not count a Y.C.A. conviction. Id. (citing Tuten, 460 U.S. at 664-65 n.6-9). Further, because the state set aside provision is like the Y.C.A., and because the case law interpreting the state provision refers to as an "expungement" provision, the court held that the conviction does not count. Id.

C. FIELD COMMENTS

TAS Hotline:

The TAS hotline data base was reviewed for additional information concerning the field's application of the career offender guideline. A total of 196 calls regarding the career offender guideline were received by the Commission's Hotline staff between January 1989, and September 1991. The questions fell into the following broad categories.

Definition of "Crime of Violence" and "Controlled Substance Offense".

Of the 196 calls received, 64 were questions regarding definitional problems within the career offender guideline. The most frequently asked question was whether or not the instant and/or qualifying prior offenses meet the definition of "crime of violence" or "controlled substance offense". Specifically, the probation officers inquired whether the application of the career offender guideline is based upon the offense of conviction (i.e., the statutory violation for which the defendant was convicted) or the real offense behavior.

Forty-six (46) of those sixty-four calls were questions regarding the definition of a "crime of violence". Many of these were inquiries about the applicability of the term to specific crimes (i.e., statutory rape, bank larceny, involuntary manslaughter). Approximately half of these forty-six (46) callers asked specifically about the use of felon in possession of a weapon as both the instant and the qualifying prior offenses.

There were also eighteen (18) calls regarding the definition of a "controlled substance offense". Fifteen (15) of these calls question the applicability of simple possession of drugs as a "controlled substance offense". Other examples include:

- Is Obtaining Drugs by Forgery a controlled substance offense?

- Is Use of a Communication Facility considered a drug trafficking offense?

General Application Issues

The second largest category of calls (63) relates to general application issues. Examples of these questions include:

- The defendant pleaded to felon in possession, but stipulated to the more serious offense of bank robbery. Is this a crime of violence?
- Does the mandatory consecutive penalty for a violation of §18 USC 924(c) still apply if the career offender provision is applicable?
- Is the career offender guideline optional?
- Do you apply Chapter Two and all specific offense characteristics, plus Chapter Three adjustments prior to the application of §4B1.1?
- If the offense level "otherwise applicable" is higher than the offense level from the career offender table; which one do you apply?
- In the case of multiple counts which trigger the career offender guideline, how do you determine the offense statutory maximum?

Acceptance of Responsibility

Twenty-six calls (26) were related to the use of acceptance of responsibility and the career offender guideline prior to the clarification of this issue in the 1989 amendments.

Chapter Four, Part A

The only other significant category of calls are actually criminal history issues covered by Chapter Four, Part A. Thirty-five (35) calls were received regarding Chapter Four definitions and rules (i.e., related cases, definition of a prior sentence). Twelve (12) of these questions were related to the applicable time frames used for qualifying prior offenses. Examples of other questions include:

- Do the provisions of §4A1.2(e) apply to counting prior convictions for the career offender guideline?
- The defendant has a prior conviction for three bank robberies that were consolidated for sentencing? Can they be used as qualifying prior offenses for the career offender guideline or does the related cases rule apply?
- Can a prior diversionary sentence be used in considering whether or not the career offender provision applies?
- Can we use an offense that occurred after the instant offense to determine career offender status?

- The defendant's prior state conviction represents conduct that is part of the instant offense. Does this qualify as a prior conviction when determining career offender status?

Departure Issues

TAS received nine (9) calls regarding departure issues. Examples include:

- Can the court depart upward based upon inadequacy of the criminal record if the defendant is determined to be a career offender?
- If the career offender guideline over represents the seriousness of the defendant's prior record, can the court departure down?

Probation Officer Comments

In addition to hotline calls received by TAS, approximately 30 probation officers from the Chapter Eight Worksheets field tests held in Chicago and California in September 1990, were given a summary of the considerations before the Criminal History Working Group. The probation officer groups were questioned regarding their concerns about the career offender guideline and the addition of criminal history categories O and VII.

Career Offender

The probation officers were strongly opposed to the elimination of the decay factor for qualifying prior offenses in the consideration of career offender status. The consensus among the probation officers was that the career offender guideline, as it stands, is extremely punitive. Drawing from their professional experience, the group saw no need to increase the number of individuals eligible for career offender status. They recommended that if the Commission felt compelled to address the issue of serious offenders who did not qualify for career offender status because of "stale" convictions, it could best be done through departure language.

More importantly, the groups considered that narrowing the definition of "crime of violence" and "controlled substance offense" to exclude less serious offenses is a much more pressing issue for the Commission to decide. The groups were very concerned about the extreme effect the career offender guideline has on the guideline ranges of individuals with less serious qualifying prior offenses. The results were described as "draconian" and "inherently unjust." For example, a prior conviction for distribution of a relatively small amount of a controlled substance currently meets the definition of a "controlled substance offense," despite the sentence received. Therefore, a defendant who has been convicted twice of distribution of drugs, yet has never received more than a ninety day term of

imprisonment, is punished as severely as the defendant who has sustained two convictions for distribution of large amounts of illegal drugs and has received substantial sentences of imprisonment. Another example given is the defendant whose prior conviction for a minor assault may trigger the career offender provision due to the state's classification of such a crime as a felony.

D. OPTIONS

Option 1 -- Eliminate Ratcheting:

Commentary or guidelines might be clarified to explicitly permit or preclude courts from utilizing an enhanced statutory maximum for career offender purposes.

Implications: the clarification might apply particularly to the following relatively common situations:

(1) an 18 U.S.C. § 922(g) (ten-year statutory maximum for felon in possession of a firearm) offender's sentence is enhanced under 18 U.S.C. § 924(e) (life maximum under Armed Career Criminal Act), where the court considers the firearm possession offense to be a crime of violence;

(2) a 21 U.S.C. § 841(a)(1)(C) offender's sentence is enhanced from twenty to thirty years as a result of the offender having one or more prior drug convictions;

(3) a 21 U.S.C. § 841(a)(1)(B) offender's sentence is enhanced from forty years to life as a result of the offender having one or more prior drug convictions; or

(4) a 21 U.S.C. § 844 offender's sentence is enhanced from one year to three years.

Care must be taken to determine exactly the offenders whose career offender range should or should not be increased. For example, it may be relevant to distinguish between sentences that have been enhanced based solely on prior offenses (e.g., under the Armed Career Criminal Act), and sentences that have increased penalties as a result of the offender engaging in more serious conduct. Some consideration should be given to legislative intent with respect to the relevant statutory maximum in such situations (see legislative history).

Option 2 -- Ensure Application of Acceptance of Responsibility:

Training or other non-amendment options may be required to ensure that offenders receive their acceptance of responsibility reduction where it applies. Courts, probation officers, and counsel apparently, in rare instances, fail to calculate the career offender range

with the acceptance of responsibility reduction, even where it has been earned and applied to the pre-career offender calculations.

Option 3 -- Ensure Proper Application of §4B1.2 Rules:

Training or other non-amendment action may be required to ensure that courts do not count prior convictions for misdemeanors, decayed prior convictions, and improperly classified crimes of violence (e.g., non-residential burglaries) or controlled substance offenses (e.g., felony drug possession offenses).

Option 4 -- Ensure Consistent Application of Actual Conduct Rule:

Training or other non-amendment action may be required to ensure that any new or prior rules regarding application of §4B1.2(1) are understood and consistently applied.

Option 5 -- Clarify Applicability of §4A1.3 to Career Offenders:

Clarify whether §4A1.3 (Inadequacy of Criminal History) applies to career offenders, thus permitting departures from the career offender range.

Implications: As noted in the section on case law, some courts have determined that §4A1.3 (Inadequacy of Criminal History) does not apply to career offenders since §4A1.3 precedes the career offender provisions at §4B1.1, et seq., and since §4A1.3 addresses itself only to inadequacies in the counting of criminal history points. Other circuits find the career offender provisions to be an integral element of the overall criminal history determination, with §4A1.3 applying to all relevant criminal history provisions. Eliminating application of §4A1.3 to §4B1.1 determinations would prevent downward departures for over representation of criminal history, and upward departures for under representation. A clarification permitting application of §4A1.3 in the case of a stale offense, would ameliorate the need for a more complete elimination of the decay factor.

Option 6 -- Clarify §4A1.2 Re: Use of Expunged Y.C.A. Convictions:

Clarify whether expunged/set-aside federal Youth Corrections Act (Y.C.A.) convictions count as qualifying prior offenses for career offender purposes. (A similar issue arises with respect to how such convictions should be counted for purposes of criminal history points.)

Implications: Prior convictions under the Y.C.A. may be considered adult convictions for purposes of criminal history provisions. The set-aside provisions of the Act are not "expungements" related to innocence, guilt, or errors of law (and not counted for criminal history purposes) or if classified as "set aside" under the guidelines, they would count in chapter 4A and 4B. Or are they such that they merely eliminated social stigma or restore civil rights ("set-asides" counted for criminal history purposes)?

APPENDIX A

SUMMARY OF RELEVANT CASE LAW

MEMORANDUM

Draft -- 10/03/91

TO: JULIE CARNES
SUSAN KATZENELSON
CRIMINAL HISTORY WORKING GROUP

FROM: VINCE VENTIMIGLIA

RE: CAREER OFFENDER "TIMING" ISSUES

DATE: OCTOBER 3, 1991

This memorandum examines appellate court perspectives on various career offender "timing" issues: (1) congressional intent with respect to the requirement of a decay factor; (2) departures on the basis of decayed prior convictions; (3) the requisite sequence in which prior convictions must have occurred in order for the prior convictions to qualify for career offender purposes; and (4) time periods in which prior convictions may be committed and still qualify as career offender predicates.

WHETHER DECAY FACTOR REQUIRED:

No case has apparently analyzed congressional intent with respect to a decay factor provision in the career offender guideline. Numerous cases have, however, reviewed the issue in the context of the Armed Career Criminal Act, and generally find that the plain language of the Act does not compel such a restriction on the age of prior convictions in order for them to be counted. While the Courts do not necessarily agree with such a result, they generally interpret the absence of such a legislative provision as clearly compelling, or at least permitting, the inclusion of aged prior offenses.

Career Offender:

No cases apparent.

Armed Career Criminal:

The Courts have held that the Armed Career Criminal statute did not include temporal restrictions on the use of prior felonies. See United States v. Blankenship, 923 F.2d 1110 (5th Cir. 1991) (permitting enhancement based on prior convictions for burglary that were 25 years old); United States v. McConnell, 916 F.2d 448 (8th Cir. 1990) (permitting use of two prior burglary convictions from 1964, and one armed robbery from 1971; noting that "if Congress had envisioned a time limit, it would have incorporated it into the statute"; referring to similar interpretations of 18 U.S.C. § 3575(e)(1), the predecessor of 18 U.S.C. § 924); United States v. Preston, 910 F.2d 81 (3rd Cir. 1990) (due process clause and other constitutional provisions do not prevent consideration of all previous convictions including a 1971 robbery, a 1977 aggravated assault, and a 1977 robbery; "plain language" of statute controls); United States v. Green, 904 F.2d 654 (11th Cir. 1990) (unambiguous statute requires that rule of lenity not be invoked to read temporal restrictions into the statute; prior convictions in 1961 for burglary, in 1963 for bank robbery, and in 1969 for armed robbery must be counted); United States v. Crittendon, 883 F.2d 325 (4th Cir. 1989).

DEPARTURE ON BASIS OF DECAYED PRIOR CONVICTIONS:

Three trends might be discerned in respect to this area.

First, "stale" or "remote" convictions may serve as a valid basis for an upward departure. [...restrictions?] The First (numerous and dangerous convictions valid basis for departure), Eighth, Ninth (numerous convictions show propensity to violent conduct), and Tenth (inadequate criminal history) circuits, and possibly the Fifth and Sixth Circuits, permit such departures.

Second, "stale" convictions may be considered valid as "reliable information" under §4A1.3, even where they are dissimilar to the current offense. The Seventh, Eighth, and Tenth Circuits have permitted such departures.

Finally, some circuits may invalidate a departure where the "stale" prior conviction was dissimilar to the instant offense (Ninth Circuit), or where the sole basis for considering the "stale" offense was that the defendant was given "a break" on sentencing, and therefore his term of imprisonment did not extend into the applicable time period.

A. "Stale" Convictions are Valid Basis for Departure

In **United States v. Richard Gardner**, 905 F.2d 1432 (10th Cir. 1990), *cert. denied,* 111 S.Ct. 202 (1990) (appeal from W.D. Okla., Russell, J.), defendant was convicted of bank robbery with a revolver, under 18 U.S.C. § 2113, and sentenced to the bottom end of the guideline range applicable for a career offender. Defendant had previously been convicted of four firearms and robbery offenses, all of which were included in the criminal history calculation. Grounds for departure (inadequacy of criminal history since two armed robbery convictions and conviction on two counts of bank robbery fell outside the fifteen year time period) were sustained. Extent of departure reasonable since Defendant resembled a career offender (particularly since firearms offenses show continued pattern of crime, and robberies were conducted using similar methods), and since no category beyond Category VI existed. Defendant had a criminal history VI (15 points), and a non-career offender guideline range of 100-125 months (level 24). The departure sentence was 210 months.

In **United States v. Joseph E. Lang**, 898 F.2d 1378 (8th Cir. 1990), the court held that sentences excluded from the criminal history calculation under §4A1.2(e)(2) may be considered in determining whether an upward departure is justified. The court cites United States v. Lopez, 871 F.2d 513 (5th Cir. 1989) and United States v. Elmendorf, 895 F.2d 1415 (6th Cir. 1990) (Table) for the proposition.

In **United States v. Alejo Cota-Guerrero**, 907 F.2d 87 (9th Cir. 1990), the court held that fourteen convictions that had occurred more than ten years prior to the offense for which defendant was being sentenced could be considered in deciding whether to depart upward from the guideline sentence, where the convictions showed a propensity toward violent conduct, and thus were similar to the present offense of possession of firearm by a felon. At least one of these prior convictions included an assault with a deadly weapon, and another for assault and battery. The senfencing court departed upward from a level 7, Category III (4-10 months) sentence to two years.

In **United States v. Kaya Aymelek, 926 F.2d 64 (1st Cir. 1991) (appeal from Torres, J., D. R.I.),** the court held that prior convictions beyond the ten-year decay period could be considered as a departure basis, where the prior convictions were distinguished by their numerosity and dangerousness.

B. "Stale Convictions" Valid as "Reliable Information" (§4A1.3)

In **United States v. Joseph N. Williams**, 910 F.2d 1574 (7th Cir. 1990), *petition for cert. filed* (Nov. 11, 1990), the court upheld an upward departure based on §4A1.2(e)(2), where the defendant was convicted under 18 U.S.C. § 922(g)(1) and, as a Category V defendant, was sentenced to 27 months imprisonment. The court departed upward from a level 9 (18-24 months). Defendant's prior convictions for unlawful taking of a motor vehicle and forgery, both of which occurred more than fifteen years prior to the current offense of felon in possession of a firearm. The "stale" offenses were dissimilar and could not be

considered under §4A1.2, but could be considered under §4A1.3 as "reliable information" for purposes of determining whether the criminal history category was underrepresented. The court notes that this information was considered with other aggravating factors in order to justify the departure.

The court cites **United States v. Carey**, 898 F.2d 642 (8th Cir. 1990) (when record did not reflect whether old burglary convictions were violent crimes or gun-related, district court properly considered them to be "reliable information" under §4A1.3 for sentencing of felon in possession) and **United States v. Jackson**, 903 F.2d 1313 (10th Cir. 1990), *rehearing granted,* 1990 WL 203177, (district court properly referred to a twenty-one year old forgery conviction in applying §4A1.3 to increase criminal history category of defendant convicted of being felon in possession of ammunition).

In **United States v. James Ray Russell**, 905 F.2d 1439 (10th Cir. 1990), (appeal from W.D. Okla., Russell, J.), the defendant had three prior convictions (two burglaries, one in 1965 and one in 1967, and one escape, in 1968) beyond the fifteen year period set forth under the career offender provisions. The court nevertheless added three criminal history points for each offense, noting that defendant had spent eleven of the fifteen years in jail, and had been released from each prior conviction for only a short period of time before committing the next offense. As a result of the increased point total, defendant's criminal history category increased from II to V, increasing his range from 51-63 months to 84-105 months. The sentencing court imposed a 105 month sentence on the defendant. The appellate court upheld the inclusion of the "stale" offenses for purposes of calculating criminal history score, finding that the offenses qualified under §4A1.3 as "reliable information."

C. Departure Invalid Where Prior Conviction is Dissimilar or Solely on Basis that Defendant "Got a Break"

In **United States v. Avinell Leake**, 908 F.2d 550 (9th Cir. 1990), the court invalidated an upward departure based on §4A1.2(e)(2) where the prior convictions were for fraud offenses, and the present convictions were for assaults, noting that the guidelines require similarity between the otherwise excluded offenses. **See also United States v. Notrangelo, ___ F.2d ___, No. 89-10221 (9th Cir. July 18, 1990).**

In **United States v. Richard Rodney Robison**, 904 F.2d 365 (6th Cir. 1990), *cert. denied,* 111 S.Ct. 360 (1990), the court held that the sentencing court could not "arbitrarily change the requirements for career offender status" simply because the defendant "got a break" on an earlier conviction by not being sentenced in a manner that would breach the ten year barrier. Defendant in that case was convicted of aggravated drug trafficking in 1977, and was convicted currently for 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute Cocaine, and 21 U.S.C. § 846, Conspiracy to Distribute Cocaine.

REQUISITE SEQUENCE:

Three interpretations might be held with respect to 28 U.S.C. § 994(h) (career offender provision) and the requisite sequence of the qualifying convictions: (1) the offender must have been separately arrested, convicted, and sentenced for each conviction prior to the commission of the subsequent offense; (2) the offender must have been arrested, convicted, and sentenced for the prior offenses prior to the commission of the instant offense; or (3) the offender can be convicted of the prior offenses at any time prior to the sentencing on the instant offense. Section 4B1.2(3) requires that the convictions (that is, entry of the judgment of conviction) for the two prior offenses precede the commission of the instant offense. Section 4B1.2(3) then precludes application of the third option, but would permit either of the first two.

The Second Circuit has held that the second approach shall be applied. The Fourth Circuit has held that, in the unusual case, an upward departure may be permitted where sentencing on the prior offenses did not precede commission of the instant offense. Finally, the Seventh Circuit has held that the prior convictions need not predate all of the constituent acts of the instant offense, but may follow some of those acts.

Career Offender:

In **United States v. Paul Chartier, 933 F.2d 111 (2nd Cir. 1991) (appeal from Spatt, J., E.D. N.Y.),** the Court discussed three readings of the apparently "ambiguous" career offender provisions with respect to sequence of events: (1) "broadest" is conviction of two priors at any time prior to sentencing for the instant offense; (2) "middle-ground" is conviction for prior offenses prior to commission of the instant qualifying offense; (3) "narrowest" is first prior, arrest, conviction, second prior, arrest, conviction, instant offense, arrest, conviction. The court pointed to the defendant's ability to learn from his convictions as the key difference between the approaches. The court held that the Commission chose the middle-ground approach in §4B1.1. The court also noted that any of the above interpretations might be reasonable implementations of 28 U.S.C. § 994(h).

In **United States v. Richard Bassil, et al., 932 F.2d 342 (4th Cir. 1991) (appeal from Bryan, C.J., E.D. Va.),** defendant could not be sentenced as a career offender. The Court indicated that defendant had to have been sentenced for the prior offense before the commission of the instant offense or the preceding conviction would not be considered a "prior conviction" for purposes of the career offender provision. However, the Court approved the approach of an upward departure based on §4A1.3 in order to sentence defendant as if he were a career offender. Defendant had been convicted of second prior crime of violence, but escaped prior to his sentencing, thereby delaying sentencing until after the commission of the instant crime of violence.

In United States v. Raymond Belton, 890 F.2d 9 (7th Cir. 1989) (appeal from Warren, J., E.D. Wisc.), the Court held that prior convictions need not predate every act constitutive of current charges against the defendant, where a narcotics convictions which predated current drug conspiracy charges was nevertheless committed after the start of the conspiracy. Court hesitated to reward defendant for having started his conspiracy early, and showed reluctance in requiring that every act of the subsequent offense be committed subsequent to the conviction. The only requirement of §4B1.2(3) is not that the offenses be separated from each other, but that the sentences be separately countable under Chapter Four, Part A.

Armed Career Criminal:

In United States v. James Anderson, 921 F.2d 335 (1st Cir. 1990) (appeal from Loughlin, S.D.J., D. N.H.), the Court held that the conviction for one predicate offense need not precede the commission of the next predicate offense; the plain language of the statute is dispositive and contains no chronicity requirement. The only requirement is that the offenses have occurred on three distinct occasions. Accord, United States v. Schoolcraft, 879 F.2d 64 (3rd Cir. *cert. denied*, ___ U.S. ___ 110 S.Ct. 546 (1990).

In United States v. Robert Balascsak, 873 F.2d 673 (3rd Cir. 1989) (appeal from Rambo, J., M.D. Penn.), the court vacated an enhanced sentence which counted as two prior convictions a two-burglary spree committed on the same night. The Court held that a defendant must have two convictions for prior felonies before he commits a third felony.

TIME FRAME:

The circuits are unanimous in finding that the career offender provision applies regardless of the time frame in which the prior offenses are committed (assuming the requisite sequence is maintained). However, the circuits split on whether departures from the career offender range may be based on the narrow time frame in which offenses are committed.

The Eighth and Tenth Circuits have permitted such a departure, while the Ninth Circuits, and at least one lower court have examined the time frame from the perspective that the offenses may actually be considered part of a common scheme or plan.

Where lower courts refused to depart downward from the career offender range, or required the application of the career offender guideline, where the offender committed the prior offenses in short periods of time, the Third (two offenses in nine months), Fifth (five felony drug offenses in two years), Seventh (two prior convictions close in time), and Eleventh (two offenses a month apart) Circuits have upheld the district court actions. These rulings generally follow those in the context of the Armed Career Criminal Act.

Proximity of Offenses is Relevant:

In **United States v. Bobby Dale Smith, 909 F.2d 1164 (8th Cir. 1990), cert. denied, 111 S.Ct. 691 (1991) (appeal from S.D. Iowa, Wolle, J.)**, the Court held a downward departure from career offender provisions is permissible on basis of "details of Smith's criminal career" where the two prior crimes were burglary of a personal residence and a drug conspiracy to sell ten doses of LSD to agents on two occasions for a total sale price of $80.00, and where the crimes occurred within a two month period when defendant was nineteen years old. The Court noted that the career was "neither extensive nor long," that defendant had only two prior State convictions, and that each incident "though serious" was a "somewhat small-time offense." Departure was to 240 months, from a range of 292-365 months. Smith reads Brown to stand for the "eminently reasonable principle" that all careers are not the same. The length and scope of the career that lands the criminal under the career-offender guideline are appropriate grounds for departure, either upward or downward, in an unusual case.

In **United States v. Jason Houser, 916 F.2d 1432 (9th Cir. 1990)**, the Court held that sentencing judges are required to look behind the mere number of prior convictions to examine the circumstances of the convictions, when determining whether they are related or whether they can be counted separately for purposes of the career offender provisions. Here, the defendant sold drugs to the same agent on two separate occasions in two different counties over a short period of time, apparently as a result of the same investigation. The defendant was convicted and sentenced at different times in different counties, and the sentencing court accordingly counted the offenses separately for career offender purposes. As a result of these two prior convictions, and the current convictions for 21 U.S.C. § 846, Conspiracy to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1), defendant was sentenced to 262 months under the career offender provisions. The Court found these transactions were part of a single common scheme or plan, and should not have been counted separately.

In **United States v. Carland Bowser, ___ F.2d ___, 1991 WL 130560 (10th Cir. 1991) (appeal from Bebber, J., D. Kans.)**, the court upheld as a rationale for departure, the fact that defendant's sole two prior convictions were close in proximity to each other (separated by less than two months), but only to the extent that this rationale was considered "as part of the composite rationale for downward departure." Other rationales included age of the defendant, and the fact that the prior convictions were sentenced to concurrent terms (perhaps implying they were not serious offenses). The departure was structured by reducing defendant's sentence from career offender to an offender with a criminal history category V (one greater than the defendant's actual category IV).

Similarly, in **United States v. Gregory Robert Rivers, 733 F.Supp. 1003 (D.Md. 1990) (Smalkin, J.)**, the defendant was convicted of bank robbery, and had two prior State convictions for two gas station armed robberies occurring twelve days apart from each other, one occurring in Baltimore City, and the other in Baltimore County. Defendant was

sentenced in the two jurisdictions, the first court sentencing defendant to twelve years imprisonment, the second to sixteen years concurrent. The sentencing court refused to consider the defendant a career offender by counting the two prior convictions separately, and instead found as fact that the two offenses would, save for "an accident of geography," have been consolidated for sentencing due to their similarity and closeness in time. The court held alternatively that the offenses were committed pursuant to a single plan, i.e., to obtain money to buy narcotics. The reported case dealt only with determining whether career offender status applied, and no sentence was imposed at that time.

Proximity of Offenses is Irrelevant:

In **United States v. Mary Elizabeth Harrison, 918 F.2d 30 (5th Cir. 1990)**, the Court found that the career offender provision was meant to apply not only to those defendants with long criminal histories but also to those who repeatedly commit drug-related or violent crimes, irrespective of time frame. The Court upheld the sentencing court's refusal to depart downward from a career offender sentence, rejecting her argument that the career offender provisions did not apply where the requisite offenses occurred within a short period of time (here five felony drug provisions over a period of two years. Defendant was sentenced to 168 months for violating 21 U.S.C. § 841(a)(1), possession with intent to distribute controlled substances.

In **United States v. Wildes, 910 F.2d 1484 (7th Cir. 1990),** the Court held that proximity in time of two prior convictions is irrelevant when counting prior convictions for two distinct crimes sentenced by two judges on two separate occasions. **Accord, United States v. Veteto, 920 F.2d 823 (11th Cir. 1991)** (convictions for burglary of residence and armed robbery of hotel were committed a month apart and sentenced separately, though to concurrent terms);

In **United States v. Kenneth Shoupe, 929 F.2d 116 (3rd Cir. 1991) (appeal from Conaboy, C.J., M.D. Penn.),** the fact that defendant's first two adult offenses were committed within a period of nine months did not require merger of those offenses for purposes of determining career offender status.

Armed Career Criminal:

The Courts, for purposes of enhancements under 18 U.S.C. § 924(e), have considered burglaries and robberies committed in short sprees nevertheless to be distinct prior offenses. See United States v. Gibson, 928 F.2d 250 (8th Cir. 1991) (three prior burglaries committed on separate dates are not part of single criminal scheme); United States v. Bolton, 905 F.2d 319 (four armed robberies occurring on separate dates, in separate locations, but convicted in single judicial proceedings, are distinct offenses); United States v. Washington, 898 F.2d 439 (5th Cir. 1990) (robbery of store and second robbery of same store, same clerk, a few hours later, are distinct offenses).

MEMORANDUM

Draft -- 10/03/91

TO: COMMISSIONER CARNES
SUSAN KATZENELSON
CRIMINAL HISTORY WORKING GROUP

FROM: VINCE VENTIMIGLIA

RE: APPELLATE DECISIONS CONCERNING CRIMES OF VIOLENCE

DATE: OCTOBER 3, 1991

This memorandum outlines recent court decisions applying the definition of "crime of violence" (under various statutes and under the guidelines) to certain offenses.

CIRCUIT APPROACHES TO DETERMINING CRIME OF VIOLENCE STATUS:

General Rule: Three Approaches

Combinations of three approaches have been used by the circuits in determining the status of an offense as a crime of violence, pursuant to the career offender guideline (§§4B1.1 and 4B1.2).

The first approach is to determine whether the offense is listed in Application Note 2 to §4B1.2.[1] Courts, unless faced with state statutes that define such offenses in non-common-

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[1] Application Note 2 provides:

"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. U.S.S.G. §4B1.2, comment. (n.2).

law terms, find that the listed offenses are crimes of violence.

The second approach is to determine whether the offense "has as an element the use, attempted use, or threatened use of physical force against the person of another."[2] This "categorical" approach relies on a review of the statute in existence at the time of the defendant's conviction under the statute, or a review of the elements of the indictment filed against the defendant.

The third approach is to review the actual facts of the offense to determine whether the conduct "present[ed] a serious potential risk of physical injury to another."[3]

Most circuits have adopted all three approaches, permitting sentencing courts to consider as a crime of violence the offense under consideration if any of the above approaches result in such a determination.[4]

Exceptions and Elaborations on the General Rule:

District of Columbia Circuit:

United States v. Butler, 924 F.2d 1124 (D.C. Cir. 1991), following United States v. Baskin, 886 F.2d 383 (D.C. Cir. 1989), apparently requires the sentencing court to review the underlying conduct of the offense (the third approach), to ensure that the offense was a crime of violence. In Butler, the Circuit Court upheld the lower court's refusal to depart where the district court considered the underlying facts of prior robbery conviction involving the sticking of a hard object in victim's mouth and stealing money from him.

Seventh Circuit:

The Seventh Circuit presents a modified D.C. Circuit approach. Where the offense is not listed in Application Note 2 to §4B1.2, but the prior conviction had statutory elements that satisfied the guideline definition of "crime of violence," then the sentencing court was nevertheless free to disregard these statutory elements and examine the underlying facts of the offense to determine if physical force were in fact involved.[5]

Ninth Circuit:

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[2] See U.S.S.G. §4B1.2(1)(i).

[3] See U.S.S.G. §4B1.2(1)(ii).

[4] See, e.g., [...].

[5] See United States v. Terry, 900 F.2d 1039 (7th Cir. 1990).

The Ninth Circuit appears to be the single circuit that permits use of only the categorical approach. **United States v. Becker, 919 F.2d 568 (9th Cir. 1991)** held that crimes of violence are determined only be statutory definition of crime and not by specific conduct occasioning convictions.

In addition, **United States v. William Potter, 895 F.2d 1231 (9th Cir. 1990)**, held, for purposes of the Armed Career Criminal provision, a prior conviction can not be used to enhance a sentence if the defendant could have been convicted of the prior crime without using or threatening force against or risking serious injury to another person, regardless of the underlying facts of prior conviction. Thus, where a state statute proscribing rape included a proscription of non-forcible rape, and the defendant was not clearly convicted under a forcible rape section of the statute, then the prior conviction could not be considered a crime of violence.[6]

FELON IN POSSESSION OF A FIREARM:

The circuits have generally found that the offense of felon in possession of a firearm may, under certain circumstances, serve as a predicate offense under the career offender guideline. The Ninth Circuit has found that the offense is in all cases a crime of violence. No other circuit has taken a similar categorical approach to this offense.

United States v. Williams, 892 F.2d 296 (3d Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 3221 (1990):
Held that felon possessing and firing a firearm is a crime of violence. Mere possession is not sufficient.

United States v. Thompson, 891 F.2d 507 (4th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1957 (1990):
Held that felon in possession of firearm is by its nature a crime of violence where felon pointed the firearm.

United States v. Goodman, 914 F.2d 696 (5th Cir. 1990):
Held that felon possessing firearm is a crime of violence where some evidence of intent to fire is shown. The court found §1B1.3 Relevant Conduct rules to support the approach of examining underlying conduct. Defendant had aimed a pistol at a group of partiers, and accidentally dropped the weapon, which was kicked into bushes and lost. Defendant returned to his home, and secured a rifle. On the way back to the party, he lost control of his vehicle, and crashed.

United States v. Alvarez, 914 F.2d 915 (7th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2057 (1991):

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[6] See also United States v. Lawrence Faulkner, 934 F.2d 190 (9th Cir. 1991) (appeal from Garcia, J., E.D. Calif.), infra.

Held that felon possessing firearm is a crime of violence where some evidence of intent to fire is shown. Mere possession is not sufficient. Defendant struggled with officer for loaded gun defendant had carried, and officer was injured.

United States v. Phillip Chapple, ___ F.2d ___, 1991 WL 158102 (7th Cir. 1991) (appeal from _____, __ J., ___ Wisc.):
Prior Illinois state conviction for "unlawful use of a weapon" is not a crime of violence since the elements of the offense deal with "carrying, possessing, or selling dangerous weapons," and since the underlying facts of the conviction did not "imply overt use of the weapon."

United States v. Harry McNeal, 900 F.2d 119 (7th Cir. 1990) (appeal from Williams, J., N.D. Ill.):
Held that felon possessing and firing a firearm is a crime of violence, by analogy to escape example in Application Note 1. Evidence for firing included smell of gun, two discharged shells, officer reporting having heard the gun fired, and bystanders pointing at defendant's vehicle.

United States v. Douglas Cornelius, 931 F.2d 490 (8th Cir. 1991) (appeal from Wolle, J., S.D. Iowa):
Defendant was convicted of being a felon in possession of a firearm after he entered the home of his wife and her current boyfriend, carrying a sawed-off shotgun, apparently with the intent to do them harm. The court upheld a determination that the defendant's conduct could be considered involving "conduct that presents a serious potential risk of physical injury to another." Defendant's other priors included assault with intent to cause serious injury, extortion, second degree arson, larceny/breaking and entering (held to be a breaking and entering burglary for purposes of 18 U.S.C. § 924(e), pursuant to Taylor, on the theory that Taylor endorsed a review of the indictment to determine the elements of an offense).

United States v. Dunn, 935 F.2d 1053 (9th Cir. 1991):
Felon in possession is by its nature a crime of violence.

United States v. O'Neal, 910 F.2d 663 (9th Cir. 1990):
Held that felon possessing firearm is per se a crime of violence since the offense "by its nature poses a substantial risk that physical force will be used against the person or property."

United States v. Walker, 930 F.2d 789 (10th Cir. 1991):
Held that felon possessing and firing a firearm at a person is a crime of violence. Mere possession is not sufficient, but court may consider conduct of defendant.

LARCENY:

At least two circuits have upheld the determination that larceny is a crime of violence, at least where the underlying conduct indicate the use, or threatened use, of force.

United States v. Louis McVicar, 907 F.2d 1 (1st Cir. 1990) (appeal from Carter, C.J., D. Me.):
Defendant's prior Tennessee state offense for larceny from the person had the elements of a crime of violence, the indictment set forth the elements of a crime of violence, and the underlying conduct amounted to a crime of violence (defendant, using a blank pistol, robbed a 7-Eleven clerk). A key consideration is that taking property from a person leads to a substantial risk of physical injury or force coming into play.

United States v. Keithroy John, 936 F.2d 764 (3rd Cir. 1991) (appeal from Merhige, J., D.C. V.I.):
Prior conviction for purposes of §4B1.1 guideline is considered crime of violence where it is (1) specifically enumerated by guideline; (2) is not enumerated, but has an element of offense the use, attempted use, or threatened use of physical force; or (3) involves conduct posing a serious potential risk of physical injury to another person. The court may not simply rely on a state's determination of the crime as a crime of violence. Here the grand larceny involved the robbing of a home while threatening the occupants with a gun, and so was a crime of violence under the third prong of analysis. The court declined the invitation to read Taylor as restricting the determination to the elements of the crime, citing "The Government remains free to argue that any offense ... should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another.'" Defendant's other offense was a third degree assault, which was not challenged as a crime of violence. The instant offense was a drug trafficking conviction.

INVOLUNTARY MANSLAUGHTER:

Only the Ninth Circuit appears to have addressed the nature of this offense,[7] and neither of those cases was in the context of §4B1.1. Nevertheless, it seems likely that the Ninth Circuit, which restricts itself to the categorical approach, would reach similar results for this offense under the guidelines.

United States v. Springfield, 829 F.2d 860 (9th Cir. 1987) (pre-guidelines case):
The court held that involuntary manslaughter (subject to 18 U.S.C. § 1112), which by its nature involved death of another person, was highly likely to be result of violence for purpose of convicting defendant of using firearm in crime of violence, under 18 U.S.C. § 924(c). In contrast to this apparent "inherent nature of the offense" approach, the lower court appears to have focused on the totality of the circumstances (defendant pointed a gun

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[7] Others have found manslaughter or voluntary manslaughter statutes to be crimes of violence. [...]

in a vehicle and pulled the trigger) in determining the offense to be a crime of violence.[8]

United States v. O'Neal, 910 F.2d 663 (9th Cir. 1990), the court followed Springfield in determining that a prior conviction for a vehicular manslaughter offense served as an Armed Career Criminal (18 U.S.C. § 924(e)) predicate, since it "involves conduct that presents a serious potential risk of physical injury to another," and since it "involved the death of another person and is highly likely to be the result of violence."

THREATENING COMMUNICATIONS:

Circuits have generally held that threatening communications offenses, at least under federal law,[9] are crimes of violence, by virtue of their having as an element the threatened use of physical force against another person. Actual ability to carry out the threat appears irrelevant to this determination. State statutes may require a closer examination of the elements, or underlying conduct.

United States v. Tony Leavitt, 925 F.2d 516 (1st Cir. 1991) (appeal from Hornby, J., D. Me.):
Prior Maine state conviction for "high and aggravated oral threatening" qualified as crime of violence, since indictment shows conduct involved potential risk of physical injury to another (defendant informed two police officers that he had a loaded shotgun and intended to "blow them away.") Court, citing Taylor v. United States, ___ U.S. ___, 110 S.Ct. 2143 (1990), is permitted to look beyond elements of the statute, which here covered risk of injury to persons and to property. Concurring opinion noted extreme effect of career offender guideline, since in this case the second prior was an assault and battery occurring within two weeks of the oral threatening conviction, in 1975 when the defendant was only 21 years of age.

United States v. Carolyn Poff, 926 F.2d 588 (7th Cir. 1991) (appeal from Miller, J., N.D. Ind.):
Defendant's instant and prior federal offenses for threatening the life of the President were crimes of violence for career offender purposes. [...]

United States v. William McCaleb, 908 F.2d 176 (7th Cir. 1990) (appeal from Mihm, J., C.D. Ill.):
Defendant's 18 U.S.C. § 871 conviction for threatening the life of the President in a letter,

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[8] Legislative history accords with this determination: "Since no culpability level is prescribed ... the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the defendant was conscious of but disregarded the substantial risk that the circumstances existed." S.Rep. No. 307, 97th Cong. 1st Sess., 890-891.

[9] E.g., 18 U.S.C. §§ 871, 876.

is a crime of violence. Defendant had three prior convictions for the same offense. In this offense, defendant removed large sums of money from his account, failed to comply with his mandatory release supervision, disappeared for some months, and reappeared in Washington, D.C., unarmed. "No semantical contrivance can avoid the simple conclusion that the conduct involved in this offense is ... the 'threatened use of physical force against the person ... of another.'"

United States v. Merle Left Hand Bull, **901 F.2d 647 (8th Cir. 1990) (appeal from D. S.D., Porter, C.J.):**
Defendant was convicted of mailing a threatening communication in violation of 18 U.S.C. § 876 to his estranged wife while he was in prison. The defendant received a career offender range of 51-63 months, but received a downward departure sentence of 48 months pursuant to 5K2.10 (victim's wrongful conduct significantly provoked the offense). The threat was held to be a crime of violence, despite defendant's argument that he had no contemporaneous ability to carry out the threat.

United States v. Derron Batten, **936 F.2d 580 (9th Cir. 1991) (unpublished disposition) (appeal from Letts, J. C.D. Calif.):**
A conviction under 18 U.S.C. § 871 for threatening the life of the President is a crime of violence. The court held that a categorical analysis must be applied by examining the statutory language defining the offense. The underlying circumstances of the offense of conviction are irrelevant for the purposes of determining career offender status.

United States v. Kevin Sherbondy, **865 F.2d 996 (9th Cir. 1988) (appeal from Hupp, J., _.D. Calif.),** California witness intimidation statute is not "violent felony" for purposes of the Armed Career Criminal statute, since the state statute does not require proof of use, or threatened use, of force against persons.

BATTERY:

United States v. Lee Terry, **900 F.2d 1039 (7th Cir. 1990) (appeal from Baker, C.J., C.D. Ill.):**
Defendant's prior Illinois state aggravated battery conviction had statutory elements that satisfied the guideline definition of "crime of violence," but the sentencing court was free to disregard these elements (where the offense was not listed in the application note), and look to the underlying facts of the offense to determine if physical force were in fact involved. Here, defendant's attorney offered uncontroverted testimony that defendant simply pled to the battery charge to avoid a prison term, and that he was in fact merely a non-violent bystander in an affray on the street.

FALSE IMPRISONMENT:

United States v. Lawrence Faulkner, 934 F.2d 190 (9th Cir. 1991) (appeal from Garcia, J., E.D. Calif.):
Defendant's prior conviction[10] for false imprisonment under California state law, may not have been a "crime of violence." In this particular offense "violence does not seem to be a necessary element"(emphasis in original), since the false imprisonment may be "effected by violence, menace, fraud, or deceit." The court noted that the actual facts of the case [...].

SMALL QUANTITIES OF DRUGS:

The circuits have held that the quantity of drugs involved in convictions for possession with intent to distribute controlled substances, is not relevant to the crime of violence determination, and may not be the basis for a departure from the career offender range.

United States v. Derrick Richardson, 923 F.2d 13 (2nd Cir. 1991) (appeal from Conboy, J., S.D. N.Y.):
Defendant convicted of instant federal drug trafficking offense involving small (.5 gram of cocaine) quantity of drugs and whose prior convictions occurred 10 and 12 years ago, is not eligible for downward departure. Quantity is implicitly taken into consideration by the guidelines, which condition sentences on statutory maximums, which themselves vary with quantity. Further, the purpose of the career offender provision is to punish violent recidivists, regardless of the particular circumstances of their crime.

United States v. Clemetra Pinckney, 938 F.2d 519 (4th Cir. 1991) (appeal from Perry, J., D. S.C.):
Small quantities of drugs (one ounce of marijuana; two grams of cocaine) in two prior trafficking offenses was a factor considered by the Commission, and can not be the basis for a departure from the career offender range.

United States v. Ricky Allen Hays, 899 F.2d 515 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 385 (1990) (appeal from W.D. Ken., Ballantine, J.):
The court invalidated a downward departure from the career offender guideline range, where the departure was based on characteristics of the current offense (defendant's lack of violent conduct in connection with the present drug offense, and the small amount of drugs involved). Defendant in this case was convicted of two counts of conspiracy to possess cocaine and marijuana with intent to distribute, under 21 U.S.C. §§ 841 and 846. Defendant was arrested with seven pounds of marijuana, various drug paraphernalia, and had been believed to sell up to $12,000 a day in drugs. The career offender range was 360 months to life, since the two prior convictions for drug trafficking qualified him as a career offender. Defendant was sentenced to twenty years.

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[10] At the time of sentencing by the district court, defendant had not then been sentenced for the prior state offense. That state offense later was dismissed for unknown reasons, although defendant had pleaded nolo contendere to the charge.

United States v. Carlton Bernard Brown, **903 F.2d 540 (8th Cir. 1990) (appeal from D. Minn., Magnuson, J.):**
The defendant was convicted under 18 U.S.C. § 2, and 21 U.S.C. § 841(a)(1), (b)(1)(C), aiding and abetting the distribution of ten ounces (283 grams) of cocaine; and 21 U.S.C. § 841(a)(1), (b)(1)(C), and 21 U.S.C. § 846, conspiracy to distribute ten ounces (283 grams) of cocaine. Defendant was sentenced to two concurrent 210 month terms under the career offender provisions. The predicate offenses were two prior convictions, one a 1986 conviction under California law for transportation of a controlled substance, and the other a 1987 State conviction for possession of a controlled substance. The district court reluctantly imposed a sentence at the lower end of the career offender range (210-262 months), in light of the "extremely harsh penalty required by the career offender guideline," which the court was "not comfortable with" since it was almost ten times longer than those received by defendant's codefendants. Proportionality, then, was a key concern, but the nature of the priors may also have influenced the lower court's decision. The appellate court remanded for resentencing, in order to permit the lower court to consider the need for a downward departure.

BURGLARY:

Almost without exception, residential burglaries are considered to be crimes of violence. The district court below notes some dissatisfaction with this result, following a review of the actual conduct involved in one case. Additional minor variations are also noted.

United States v. Sherman Nichols, **740 F.Supp. 1332 (N.D.Ill. 1990) (Hart, J.):**
The defendant was convicted of being a felon in possession of a firearm, under 18 U.S.C. § 922(g), use of a firearm during a drug trafficking offense, under 18 U.S.C. § 924(c), and 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute .83 grams of cocaine. Defendant had prior State convictions for residential burglary (juvenile), robbery, auto theft, and residential burglary (adult conviction). The career offender range is 360 months to life. The sentencing court departed downward from this range, in part on the basis of §4A1.3, overstatement of criminal history, particularly since the opportunity for recidivism in an older defendant (here in his early thirties) is lower. The court noted the absence of details regarding the prior convictions, but noted the absence of actual violence in any of those offenses. The court departed downward from the career offender range, finding defendant was a category V offender, with an offense level 24 (92-115 months) (based on level 12 for the offenses of conviction, enhanced by 12 levels for a modified career offender sentence that accounts for the low level of drugs and overstated criminal history), and imposed the statutory minimum of 240 months (180 months for armed career offender and 60 months for the 924(c) offense).

United States v. Michael Harkey, **890 F.2d 1082 (9th Cir. 1989):** Washington state burglary conviction was not crime of violence for Armed Career Criminal purposes where the statute failed to require conviction of common-law offense of burglary.

United States v. Donnie O'Neal, 937 F.2d 1369 (9th Cir. 1990):
The Court determined that generic burglary is crime of violence, and underlying facts of conviction may not be examined.

United States v. David Sherman, 928 F.2d 324 (9th Cir. 1991) (appeal from Byrne, J., C.D. Calif.):
Prior Idaho state conviction for burglary of hotel manager's office with a firearm in the middle of the night constitutes a crime of violence. Court may only use the categorical approach to determine nature of prior conviction. State offense has as element of burglary the entering of any building, and penalty enhancement statute applies for use of a firearm. Mere possession of firearm creates grave risk of harm to victims, even if the firearm is inoperable, since officers are more likely to respond with force to an offender in possession of a firearm.

United States v. Ramon Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990) (appeal from N.D. Ga., Tidwell, J.):
The defendant had prior State convictions including robbery by force and fear (robbery of a woman's purse containing $5.35), armed robbery of a supermarket, attempted burglary of an occupied residence, burglary of unoccupied residence ($450 in merchandise taken). All but the second prior conviction received separate sentences of three years probation, and that conviction received a 364-day sentence. The sentencing court held that the facts underlying the prior convictions demonstrated that the crimes were not crimes of violence. In the alternative, the court held that, if the career offender provisions applied, a downward departure was warranted since the guideline did not adequately consider a situation where the priors in fact did not involve violence, and because such a career offender sentence would be "grossly unfair and grossly excessive." The defendant argued that the Commission did not adequately distinguish between crimes that involve the actual use of force and result in injury, and those that involve nothing more than the threat of force and do not result in injury.
The appellate court rejected this argument, finding the Commission did adequately consider such a distinction. The court noted that it was also unlikely that the Commission would prohibit the review of the underlying facts of the prior convictions in order to determine whether defendant qualified for career offender status, but would permit such a review to determine whether to depart from the resulting guideline range. The court also prohibited departure where the departure was based on the grounds that the sentence appeared excessive, citing United States v. Aguilar-Pena, 887 F.2d 347 (1st Cir. 1989).

ROBBERY:

Armed robbery and robbery under 18 U.S.C. § 2113 is considered by virtually every circuit to be a crime of violence. (The exception may be the District of Columbia Circuit, which requires a review of the underlying facts of each specific offense before categorizing an offense as a crime of violence.) Unarmed robbery, however, does not fare as evenly under the categorical approach -- some circuits require a review of the underlying facts to determine the existence of at least a threat of violence.

Armed Robbery or Bank Robbery:

United States v. Wilson Davis, 915 F.2d 132 (4th Cir. 1990) (appeal from Potter, C.J., W.D. N.C.):
Unarmed bank robbery was considered a crime of violence, after analyzing the facts of the case (defendant passed a note threatening to shoot the teller), after reviewing application note 1 (listing robbery as a crime of violence) and after reviewing the elements of the statute of conviction (18 U.S.C. § 2113(a)).

United States v. Dan Jones, 932 F.2d 624 (7th Cir. 1991) (appeal from Evans, J., D. Wisc.):
The federal offense of bank robbery is per se a crime of violence, as noted in application note 2. The Court nevertheless analyzed the underlying facts of the unarmed bank robbery and determined it to be a crime of violence in light of the conduct and words of defendant and his accomplice (threatened use of force, verbal warnings, bag may have held weapon).

United States v. Steven Carter, 910 F.2d 1524 (7th Cir. 1990):
The court determined that the elements of an Illinois robbery statute (requiring use or threat of use of force) were sufficient to make out a crime of violence, and the sentencing court was not required to look at the underlying facts of the robbery.

United States v. Selfa, 918 F.2d 749 (9th Cir. 1990), petition for cert. filed, (U.S. Aug. 10, 1990) (No. 90-5422):
The Court determined that a conviction under 18 U.S.C. § 2113(a) is always a crime of violence, pursuant to a categorical review of the elements of the statute.

United States v. Michael Graham, 931 F.2d 1442 (11th Cir. 1991): Bank robbery is considered a "crime of violence," apparently without exception, pursuant to application note 2 to §4B1.2(1)(i).

United States v. William Butler, 924 F.2d 1124 (D.C. Cir. 1991): Robbery was considered crime of violence following analysis of surrounding facts. The Court requires such an analysis of all prior convictions, and where force or the threat of force is not apparent from such a review, the conviction is not considered a crime of violence. See United States v. Baskin, 886 F.2d 383 (D.C. Cir. 1989).

Unarmed Robbery:

United States v. McAllister, 927 F.2d 136 (3rd Cir. 1991):
The Court used the categorical approach to determine that robbery was crime of violence, and approved use of underlying facts approach where predicate crimes are not categorically crimes of violence.

United States v. Peter Maddalena, 893 F.2d 815 (1989), rehearing denied, ___ F.2d ___ (6th Cir. 1990), an unarmed robbery was a crime of violence in light of the underlying facts of the offense (ski mask worn, verbal statement).

United States v. Lester McDougherty, 920 F.2d 569 (9th Cir. 1990):
The Court held that convictions under a California robbery statute were always crimes of violence, since the use or threatened use of force was in all cases an element of the offense.

MEMORANDUM

Draft -- 10/03/91

TO: COMMISSIONER CARNES
SUSAN KATZENELSON
CRIMINAL HISTORY WORKING GROUP

FROM: VINCE VENTIMIGLIA

RE: CASE LAW ADDRESSING INADEQUACY OF CRIMINAL HISTORY CATEGORY VI

DATE: OCTOBER 3, 1991

This memorandum briefly summarizes certain cases that have addressed the inadequacy of Criminal History Category VI.

One issue of interest in these cases is the extent of criminal history, particularly the number of criminal history points that might compel a sentencing court to depart upward on the basis of inadequate criminal history. Most of the cases in this concededly incomplete and unrepresentative sample, involved defendants with between 15 and 21 points, with 1 case falling in the 13-15 point range, 5 cases in the 16-18 point range, and 4 cases in the 19-21 point range.

A second issue of interest is the standard by which appellate courts consider the reasonableness of the extent of departure.[1] The Circuits generally employ one of three

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[1] Most circuits have adopted a three-part departure test similar to that provided in United States v. Gregory White, 893 F.2d 276 (10th Cir. 1990), requiring (1) that the factors

United States v. Donald Bernhardt, 905 F.2d 343 (10th Cir. 1990)
(appeal from W.D. Okla. Russell, J.)

Defendant was convicted of forging a check, under 18 U.S.C. § 1344. As a result, the bank lost $21,000. Defendant had appeared before the court twelve times, primarily on fraud charges. Grounds for departure (Defendant is tantamount to a career criminal, with history of fraud, extensive criminal history significantly beyond typical Category VI Defendant) were upheld. Extent of departure was reasonable, though it "stretches the proportionality concept to the limit." The Commission did not require the use of the next highest offense level -- if it had intended this result the Commission would have indicated that such a movement between offense levels was required. *See* United States v. Roberson, 872 F.2d 597 (5th Cir. 1989).

Criminal History: VI (25 points)
Guideline Sentence: Level 8 (18-24 months)
Departure Sentence: 60 months

United States v. Richard Brown, 899 F.2d 94 (1st Cir. 1990)
(appeal from D. Me., Cyr, J.)

Defendant was convicted of unlawful possession of stolen mail in violation of 18 U.S.C. § 1708. Defendant had numerous prior convictions, including those for assault and battery, theft, criminal mischief, disorderly conduct. Grounds for departure (including extent of criminal history not accounted for by mere Category VI where Defendant has greater than 50% the number of history points) upheld as showing a penchant for criminality not accounted for by the guidelines. Extent of departure reasonable.

Criminal History: VI (20 points)
Guideline Sentence: Level 3 (3-9 months)
Departure Sentence: 21 months

United States v. Luis Colon, 905 F.2d 580 (2nd Cir. 1990)
(appeal from S.D. N.Y., Walker, J.)

Defendant was convicted of ten counts of dealing heroin through "Hell's Kitchen" in the vicinity of a school. Grounds for departure (criminal history fails to account for lenient sentences for ongoing criminal conduct, including crimes of violence and drug-related crimes, during the last thirteen years, making Category VI inadequate, among other grounds for departure) were upheld. Remanded to determine of extent of departure.

Criminal History: VI
Guideline Sentence: Level 16 (57-71 months)

Departure Sentence: 15 years

United States v. Roberto Rivera, 879 F.2d 1247 (5th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 554 (1989) (appeal from S.D. Tex., Hinojosa, J.)

Defendant was convicted of transporting 13 undocumented aliens. Grounds for departure (including the excess five points over the minimum 13 required for criminal history Category VI) were upheld as reasonable. Extent of departure was reasonable.

Criminal History: VI (18 points)
Guideline Sentence: Level 13 (33-41 months)
Departure Sentence: 60 months

United States v. Calvin Rogers, 917 F.2d 165 (5th Cir. 1990) (appeal from Smith, W.D. Tex.)

Defendant was convicted of possessing a firearm as a felon. Prior convictions include 11 convictions for DWI, criminal trespass, burglary, conspiracy to import marijuana, and others. Grounds for departure (including excessive criminal history, table was not expanded beyond Category VI "as it should have been," and other reasons) held reasonable. Extent of departure reasonable.

Criminal History: VI (21 points)
Guideline Sentence: Level 11 (27-33 months)
Departure Sentence: 48 months

United States v. Joseph Christoph, 904 F.2d 1036 (6th Cir. 1990), *petition for cert. filed,* (U.S. Aug. 23, 1990) (No. 90-5535) (appeal from N.D. Ohio, McQuade, J.)

Defendant was convicted of two counts of credit card fraud, under 18 U.S.C. § 1029. One ground for departure (criminal history fails to account for lengthy criminal record which was likely to continue) was upheld in light of Defendant committing additional, similar crimes while in jail, pending charges, and past criminal conduct not resulting in conviction -- none of which was accounted for in the criminal history. Extent of departure held reasonable.

Criminal History: VI (17 points)
Guideline Sentence: Level 13 (33-41 months)
Departure Sentence: 60 months

United States v. James Belanger, 892 F.2d 473 (6th Cir. 1989) (appeal from E.D. Mich., Newblaff, J.)

Defendant was convicted of making a false statement in connection with the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6), and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) when he purchased a rifle, ostensibly intending to use it for recreation. Grounds for departure (including extent of criminal history not accounted for by mere Category VI where Defendant has greater than double the number of history points) were upheld. Extent of departure held reasonable.

Criminal History:	VI (29 points)
Guideline Sentence:	Level 5 (9-15 months)
Departure Sentence:	24 months

United States v. Joe Dycus, 912 F.2d 466 (6th Cir. 1990) (unpublished disposition) (text in Westlaw) (appeal from Higgins, J., M.D. Tenn.)

Defendant was convicted under 26 U.S.C. § 5861(d) for possession of an unregistered short barrel shotgun. Defendant had prior convictions for felon in possession of a firearm (two convictions), and conspiracy to distribute controlled substances. Grounds for departure (including §4A1.3 and criminal history score) were reasonable. Extent of departure, based on hypothetical Category VIII, into which 19 points might fall, was reasonable.

Criminal History:	VI (19 points)
Guideline Sentence:	Level 10 (24-30 months)
Departure Sentence:	46 months

United States v. Sam Couch, 927 F.2d 605 (6th Cir. 1990) (unpublished disposition) (text in Westlaw) (appeal from Spiegel, J., S.D. Ohio)

Defendant was convicted of credit card fraud. Defendant's numerous priors included a variety of fraud offenses. Grounds for departure (particularly §4A1.3 and numerous consolidated sentences) were held reasonable. Extent of departure

Criminal History:	VI (19 points)
Guideline Sentence:	Level 9 (21-27 months)
Departure Sentence:	60 months

United States v. Miguel Suarez, 939 F.2d 929 (11th Cir. 1991)
(appeal from Ryskamp, J., S.D. Fla.)

Defendant was convicted of various firearms offenses. Ground for departure ("severity of criminal history not adequately considered") was sufficient. Extent of departure, based on extrapolation of 19 criminal history points (including 2 additional points for a consolidated sentence) to a criminal history category VIII, was reasonable.

Criminal History:	VI (17 points)
Guideline Sentence:	Level 15 (41-51 months)
Departure Sentence:	60 months

CAREER OFFENDER ANALYSIS

The Tenth Circuit has permitted as "proportional" or "reasonable" an explicit reference to the theoretically applicable career offender sentence. The Sixth Circuit permitted a sentence to be imposed that was effectively the career offender sentence, but gave no explicit approval to the general approach in its decision. The Eleventh Circuit, in United States v. DelVecchio, 920 F.2d 810 (11th Cir. 1991), indicated it would accept a departure to a career offender sentence for a Category II offender, where the concerns underlying the career offender classification, the seriousness of the prior convictions, and the recidivist tendencies of the defendant justify such a sentence.

United States v. Franklin Joan, 883 F.2d 491 (6th Cir. 1989)
(appeal from S.D. Ohio, Smith, J.)

Defendant was convicted of 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute Marijuana, 21 U.S.C. § 843(b), Telephone Count, and 18 U.S.C. § 922(g), Felon in Possession of a Firearm. Defendant had prior convictions for aggravated robbery with a firearm, during which he kidnapped a drug store employee; for aggravated trafficking, during which he carried a .44 Magnum. Grounds for departure (including inadequate criminal history based on nature of prior convictions, and threat to the public health and safety) were upheld. Extent of departure was based on increase in offense level to 24 (100-125 months), (equivalent to a career offender sentence) and was held reasonable.

Criminal History:	VI
Guideline Sentence:	Level 18 (57-71 months)
Departure Sentence:	120 months

United States v. Richard Gardner, 905 F.2d 1432 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 1990 WL 120194 (1990) (appeal from W.D. Okla., Russell, J.)

Defendant was convicted of bank robbery with a revolver, under 18 U.S.C. § 2113, and sentenced to the bottom end of the guideline range applicable for a career offender. Defendant had previously been convicted of four firearms and robbery offenses, all of which were included in the criminal history calculation. Grounds for departure (inadequacy of criminal history since two armed robbery convictions and conviction on two counts of bank robbery fell outside the fifteen year time period) were sustained. Extent of departure reasonable since Defendant resembled a career offender (particularly since firearms offenses show continued pattern of crime, and robberies were conducted using similar methods), and since no category beyond Category VI existed.

Criminal History:	VI (15 points)
Guideline Sentence:	Level 24 (100-125 months)
Departure Sentence:	210 months

United States v. Bobby Dean, 908 F.2d 1491 (10th Cir. 1990)
(appeal from W.D. Okla., Russell, J.)

Defendant was convicted of possession of a semi-automatic shotgun. Defendant had prior convictions for unauthorized use of a motor vehicle, first degree rape (Defendant also brandished a knife), of violating 18 U.S.C. § 922(g) (felon in possession of a firearm), robbery with a firearm and burglary, and a second burglary, and these convictions were sentenced separately. Additional convictions for assault with intent to kill and robbery with a dangerous weapon, which offenses took place ten months apart, were considered related cases to the rape conviction, since they were sentenced on the same day. Grounds for departure (including the inadequacy of criminal history given the related cases exclusion, and the inadequacy of Category VI given Defendant's criminal record) were upheld. Extent of departure held unreasonable in light of the court's failure to adequately justify the extent of the departure, and the appellate court can find no extension of criminal history category, no analogy or reference to guideline principles, that would justify doubling the permitted guideline sentence. It is not apparent whether the court would have upheld sentencing under the career offender provision (which would have provided a level 24 - Category VI range of 100-125 months).

Criminal History:	VI (17 points)
Guideline Sentence:	Level 8 (18-24 months)
Departure Sentence:	48 months (consecutive to sentence already serving)

ARTIFICIAL CATEGORY VII (STEP BY STEP PROGRESSION)

The Seventh Circuit appears to be the only circuit to have explicitly required in the context of a departure upward from Category VI, that the departure guideline range be based on a theoretical Category VII constructed by adding 10-15% to the Category VI sentence applicable at the relevant offense level. In other contexts not directly concerning Category VI defendants, however, the Fifth Circuit (see United States v. Houston Jones, 905 F.2d 867 (5th Cir. 1990) (departure requires consideration of intervening criminal history category), Eighth Circuit (see United States v. Thomas, 914 F.2d 139 (8th Cir. 1990) (compare seriousness of defendant's criminal history with that of higher categories resembling defendant's history)), Ninth Circuit (see United States v. Faulkner, 934 F.2d 190 (9th Cir. 1991) (departure must be guided by analogy to criminal history categories)), Eleventh Circuit (see United States v. Johnson, 934 F.2d 1237 (11th Cir. 1991) (look to next highest criminal history category at same base offense level)) in cases not directly concerning Category VI defendants, may have indicated an interest in adopting this approach.

U.S. v. Kevin Schmude, 901 F.2d 555 (7th Cir. 1990), Docket No. 88-CR-121, USSC No. 89-10199, (appeal from E.D. Wis.)

Defendant agreed to sell for cash a number of weapons, including semi-automatic weapons, to undercover agents the Defendant believed were convicted felons. Defendant was convicted on two counts, §§ 922(a)(1) (dealing in firearms without a license), and 922(g)(1) (felon in possession of a firearm), and sentenced to 60 months after the judge departed upward from a level 9 sentence (21-27 months) to two concurrent 60-month sentences, finding that Defendant's criminal history category underrepresented his criminal history, particularly in light of the fact that the Defendant had been convicted and sentenced for the same offense at least once before. No statement of reasons appears in the file to justify the admitted upward departure. The appellate court, following the Fifth Circuit, agreed that prior convictions for the same offense might call for greater sanctions to deter Defendant from committing the same offense yet a third time. However, the appellate court found the doubling of the sentence to be unreasonable, and indicated a preference for a ten to fifteen per cent increase, more commensurate with a single criminal history category increase. The appellate court, however, expressed support for the sentencing result achieved by the lower court, and noted the ability of the sentencing court on remand to sentence Defendant to a guideline term consecutive (instead of concurrent, as the court initially did) to a state term Defendant was then serving. The resulting time served would approximate the length of the term imposed under the challenged departure. *See also* United States v. Jaime Ferra, 900 F.2d 1057 (7th Cir. 1990) (appeal from E.D. Wis., Warren, C.J.) (Circuit court recommended establishing judicially created, higher criminal history categories by increasing the ranges incrementally by 10-15%, as apparently intended by the Commission).

Criminal History:	VI
Guideline Sentence:	Level 9 (21-27 months)
Departure Sentence:	60 months

United States v. Donny Harvey, 897 F.2d 1300 (5th Cir. 1990), *petition for cert. filed,* (U.S. Aug. 6, 1990) (No. 90-5530)
(appeal from W.D.Tex., Smith, J.)

Defendant was convicted under 18 U.S.C. § 922(g), felon in possession of a firearm. Grounds for departure (several convictions more than 10 years old) were upheld. Extent of departure was reasonable, despite United States v. Lopez, 871 F.2d 513 (5th Cir. 1989), since here the Defendant's criminal history category was high.

Criminal History:	V	
Guideline Sentence:		Level 9 (18-24 months)
Departure Sentence:		60 months

United States v. Houston Jones, 905 F.2d 867 (5th Cir. 1990)
(appeal from E.D. Tex., S.B. Hall, J.)

Defendant was convicted of exchanging cocaine for food stamps, in violation of 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute Cocaine, and 7 U.S.C. § 2024(b), Unauthorized Acquisition of Food Stamps. Grounds for departure (mere recitation of priors, including those not counted in the criminal history calculation due to staleness -- burglary, robbery by assault, burglary -- see also United States v. Fitzwater, 896 F.2d 1009 (6th Cir. 1990, United States v. Kennedy, 893 F.2d 825 (6th Cir. 1990)) held not sufficiently explicated. Extent of departure, in contrast with United States v. Harvey, in fact requires consideration of intervening Criminal History Category VI, where departure is beyond Category VI.

Criminal History:	V	
Guideline Sentence:		Level 11 (24-30 months)
Departure Sentence:		120 months

MEMORANDUM

Draft -- 10/03/91

TO: COMMISSIONER CARNES
SUSAN KATZENELSON
CRIMINAL HISTORY WORKING GROUP

FROM: VINCE VENTIMIGLIA

RE: CAREER OFFENDER PROVISIONS

DATE: OCTOBER 3, 1991

This memo will summarize the appellate decisions which have considered whether downward departures are permitted for offenders sentenced under the Guideline's career offender provisions at §4B1.1.

I. WHETHER DOWNWARD DEPARTURES FROM CAREER OFFENDER RANGE PERMITTED

A. No Departures Permitted

In United States v. Henry Clay Saunders, 743 F.Supp. 444 (E.D. Va. 1990) (Ellis, J.), the court held that no downward departure under §4A1.3 was available to a career offender.

Defendant was convicted of raping a woman at Fort Belvoir, after smoking crack with her, and received a total offense level 31, increased to level 37 (360 months to life) under the career offender provisions. Defendant had prior convictions for armed robbery in 1977, felonious assault in 1984, and unlawful wounding in 1989. The court refused to depart on the basis that no departures under §4A1.3 from §4B1.1 were contemplated in light of the mandatory language used in the career offender guideline. The court also held that the guidelines explicitly incorporate §4A1.2, but not §4A1.3, into §4B1.1; held that the legislative history of the provision requires a sentence near the statutory maximum; and noted that since criminal history plays a limited role in measuring the degree of career offender enhancement (contrasted with the seriousness of the offense), then it should not be used as a departure basis to lessen the degree of enhancement. Defendant was sentenced to 360 months imprisonment.

In United States v. Lawrence Faulkner, **934 F.2d 190 (9th Cir. 1991) (appeal from decision by Garcia, J., E.D. California),** the court held departure based on §4A1.3 from §4B1.1 sentence was not justified by analogy or otherwise since §4A1.3 follows and applies only to §§4A1.1 and 4A1.2. No similar provision follows or applies to §4B1.1. Departure in this case was upward, based on analogy to the career offender guideline, where defendant had been convicted but not sentenced for second crime of violence. Not apparent from decision the extent, if at all, to which the court would accept other departures from §4B1.1 where the facts of the case differed.

B. Departures Permitted

In United States v. Howard Eugene Hughes, 901 F.2d 830 (10th Cir. 1990), *cert. denied,* 111 S.Ct. 163 (1990) (appeal from W.D. Okla., West, J.), the court notes that downward departures from all guideline sentences, including a career offender sentence, are permitted. However, no such departure was contemplated in this case, which involved a bank robbery while brandishing a machinegun.

In United States v. Robert Gant, 902 F.2d 570 (7th Cir. 1990) (appeal from E.D. Wisc., Warren, C.J.), a defendant received a 120 month sentence instead of a 210-262 month sentence under the career offender provisions. The downward departure for substantial assistance was held valid.

In United States v. Paul Adkins, 937 F.2d 947 (4th Cir. 1991) (appeal from Tilley, J., M.D. N.C.), departure based on §4A1.3 from career offender range was held possible, since "'career offender' is a type of, not an alternative to, criminal history." "Such departures 'are reserved for the truly unusual case.'" The dissent noted that Congress precluded such departure authority in the express command that the Commission "shall assure" that the career offender is sentenced at or near the statutory maximum.

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DRAFT -- DRAFT -- MEMORANDUM DRAFT – DRAFT – DRAFT

TO: CAREER OFFENDER WORKING GROUP

FROM: VINCE VENTIMIGLIA

RE: FEDERAL YOUTH CORRECTIONS ACT: EFFECT OF SECTION 5021 SET-ASIDES ON SENTENCING AND CRIMINAL HISTORY

DATE: JULY 31, 1991

The career offender working group recently requested further information on the effect on criminal history of expungements or set-asides under 18 U.S.C. § 5021 of the Federal Youth Corrections Act.

The Federal Youth Corrections Act (18 U.S.C. §§ 5005-5026) was initially enacted in 1950, and was repealed by the Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 2027.

Section 5021 provided:

"(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

"(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect."

A review of federal appellate court decisions results in the following generalizations: the Y.C.A. provides for the expungement of prior convictions upon satisfaction of certain conditions. Such expungement generally results only in the barring of public access to the record -- not the expunction of the record from access by law enforcement or judicial officials. Consequently, such officials may use the expunged prior conviction for purposes of determining an appropriate sentence -- but the expunged conviction may not serve as a predicate conviction for a status offense (such as convicted felon in possession of a firearm). Further, a recent decision suggests that the Guidelines prohibit the consideration of such set-aside priors for purposes of criminal history score.

The following discussion develops these points more fully:

Y.C.A. Arrest Records Are Not Destroyed:

In United States v. Doe, 732 F.2d 229 (1st Cir. 1984), the First Circuit held that section 5021(a) did not provide for the destruction, segregation, or sealing of an arrest record. Accord, Doe v. Webster, 606 F.2d 1226, 1230 (D.C.Cir. 1979) (section 5021(b)).

Y.C.A. Conviction Records Not Destroyed, but Segregated so as to Limit Public (Not Judicial) Access to Conviction Records:

The First, Sixth, and Eighth Circuits have held that a youthful offender is not entitled to have his conviction record expunged pursuant to section 5021(a). See United States v. Doe, 732 F.2d 230-32; United States v. Doe, 556 F.2d 391, 392-93 (6th Cir. 1977) (effect of the discharge is to provide a unique shield from the prejudicial effects of a conviction; but expungement of a record rests within the inherent equitable powers of a federal court); United States v. McMains, 540 F.2d 387, 389 (8th Cir. 1976) (no expungement since Congress did not provide plainly for such a result, since issuance of a certificate of expungement implies otherwise, and since arrest records where there has been no conviction are not typically expunged); see also United States v. Klusman, 607 F.2d 1331, 1334 (10th Cir. 1979) (conviction may be set aside, but every remnant of the conviction is not necessarily expunged -- including, in this case, from the memory of the judge with prior knowledge of the Y.C.A. conviction).

The District of Columbia Circuit and the Tenth Circuit have indicated that section 5021(a) mandates segregation and sealing from public access of a youthful offender's conviction record. See Watts v. Hadden, 651 F.2d 1354, n. 3 (10th Cir. 1981); Doe v. Webster, 606 F.2d 1226, 1232-44 (D.C.Cir. 1979) ([The drafters'] primary concern was that rehabilitated youth offenders be spared the far more common and pervasive social stigma and loss of economic opportunity that in this society accompany the "ex-con" label.... [T]hey intended to give youthful ex-offenders a fresh start ... ."

The D.C. Circuit later held in United States v. Doe, 730 F.2d 1529 (D.D.C. 1984), that the Y.C.A. required protection of expunged records from public access, but not from access by law enforcement personnel, or officers of the court who have legitimate law enforcement or judicial purposes for consulting the records.

Y.C.A. Priors Serve As Sentencing Factor:

United States v. Gardner, 860 F.2d 1391 (7th Cir. 1988): Defendant's prior conviction for wire fraud, which had been set aside under the federal Youth Corrections Act, was properly considered in sentencing defendant convicted of two counts of willfully and knowingly assisting in unauthorized interception and reception of cable service; prior conviction was similar in nature to current offenses for which defendant was being sentenced, and magistrate made it clear that he was considering prior convictions for the rehabilitative aspect of sentencing.

The Court noted particularly that sentencing courts have discretion to use a broad range of sources of information when sentencing an offender. Moreover, as noted above, although Y.C.A. allows a judge to set aside a conviction, it does not allow for the expungement of a court record of a trial and conviction. The court record thus remains available for a trial court to consider when sentencing a defendant for a subsequent conviction.

United States v. Campbell, 724 F.2d 812 (9th Cir. 1984): prior drug conviction referred to in presentence report could be considered in imposing sentence. Judges have broad discretion to consider a wide range of information when determining sentence. Expungement does not affect the non-public record retained by criminal justice personnel.

Y.C.A. Priors Do Not Serve As Guideline Criminal History Predicate:

United States v. Hidalgo, 932 F.2d 805 (9th Cir. 1991): Youthful offender conviction that was "set aside" under state law was "expunged" under Sentencing Guidelines (U.S.S.G. §4A1.2(j)), and could not be included in determining defendant's criminal history. Key element here may be that California specifically releases defendant "from all penalties and disabilities resulting from the offense or crime." Court found, in dicta, that Guidelines commentary was "unnecessarily confusing" in its distinction between convictions that had been "set aside" and those that were expunged.[1] The court noted that Supreme Court in

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[1] U.S.S.G. §4A1.2, comment. (n.10) notes that

> "A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal

Tuten v. United States, 460 U.S. 660 (1983), considered the Youth Corrections Act set-aside provision to be an expungement provision.[2]

Y.C.A. Priors Do Not Serve As Predicate Barring F.A.A. License:

Mines v. National Transp. Safety Bd., 862 F.2d 617 (6th Cir. 1988): Youth Corrections Act is an expungement statute which permits elimination of conviction from defendant's record, even though it does not provide for actual destruction of record of conviction. Conviction, which had been set aside under Youth Corrections Act, could not constitute a "conviction" for purposes of federal aviation regulation providing for revocation of pilot certificate upon conviction of a drug charge.

Y.C.A. Priors Do Not Serve As Predicate for Status Offense:

Felon in Possession:

In United States v. Fryer, 545 F.2d 11 (6th Cir. 1976), the court held that a conviction set aside under the Y.C.A. could not constitute a "conviction" for purposes of 18 U.S.C. App. § 1202(a) (illegal possession of firearm by felon) and 18 U.S.C. § 922(a)(6) (making a false statement to a federally licensed seller of firearms in connection with the purchase of a firearm). The Y.C.A., "by legislative design an expungement statute," and one aimed at the rehabilitation of young offenders, is intended "to give the offender a second chance free from any record of conviction."

Accord, United States v. Purgason, 565 F.2d 1279 (4th Cir. 1977) (conviction automatically set aside under section 5021(b) is no longer viable, and can have no further operative effect, a result consistent with the rehabilitative purposes of the Y.C.A.).

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conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted."

As the court in Doe v. Webster, supra, points out, the specific statute's use of the terms "set aside" or "expunge" should not be controlling, in light of modifications in the use of such terms over time.

[2] However, in contrast with the appellate court view, the Y.C.A. has been considered to have a primary purpose of rehabilitation by way of removing the societal stigma associated with prior convictions (see e.g., Doe, supra) -- expunctions under the Y.C.A. are not intended to address innocence or errors of law. It might be said then that the Guideline commentary would treat a Y.C.A. more as a set-aside statute, thus requiring that the Y.C.A. prior be counted for purposes of the criminal history calculation.

Deported Felon:

In Morera v. I.N.S., 462 F.2d 1030 (1st Cir. 1972), the defendant whose conviction under the Y.C.A. had been set aside was not subject to deportation on the basis of that conviction. Purpose of Act is to relieve defendant of usual disabilities, and give defendant a second chance free of a record tainted by a conviction. The Act does not merely contemplate a "technical erasure" of the conviction.

APPENDIX B

EMPIRICAL FINDINGS AND TABLES

Table 1

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY OFFENSE TYPE
(October 1, 1989 through September 30, 1990)

PRIMARY OFFENSE	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	8,502	4,859	100.0	2,338	100.0	1305	100.0
Homicide	25	5	0.1	17	0.7	3	0.2
Kidnapping	12	4	0.1	2	0.1	6	0.5
Robbery	184	83	1.3	79	3.4	42	3.2
Assault	73	29	0.6	31	1.3	13	1.0
Burglary/B&E	16	6	0.1	7	0.3	3	0.2
Larceny	615	389	8.0	144	6.2	82	6.3
Embezzlement	570	446	9.2	78	3.3	46	3.5
Tax Offenses	39	23	0.5	13	0.6	3	0.2
Fraud	1,000	626	12.9	251	10.7	123	9.4
Drug Importation & Distribution	3,871	2,087	43.0	1,143	48.9	641	49.1
Drug Simple Possession	272	155	3.2	71	3.0	46	3.5
Drug Communication Facility	108	66	1.4	28	1.2	14	1.1
Auto Theft	45	18	0.4	14	0.6	13	1.0
Forgery/Counterfeiting	306	147	3.0	88	3.8	71	5.4
Sex Offenses	75	46	1.0	21	0.9	8	0.6
Bribery	49	39	0.8	9	0.4	1	0.1
Escape	27	16	0.3	8	0.3	3	0.2
Firearms	287	117	2.4	97	4.2	73	5.6
Immigration	310	193	4.0	81	3.5	36	2.8
Extortion/Racketeering	94	56	1.2	27	1.2	11	0.8
Gambling/Lottery	47	24	0.5	18	0.8	5	0.4
Money Laundering	46	27	0.6	14	0.6	5	0.4
Other	431	277	5.7	97	4.2	57	4.4

Table 2

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY INJURY TO VICTIM
(October 1, 1989 through September 30, 1990)

INJURY TO VICTIM	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	7,616	4,313	100.0	2,145	100.0	1,158	100.0
No injury	7,501	4,280	99.2	2,084	97.2	1,137	98.2
Injured not treated	24	12	0.3	7	0.3	5	0.4
Treated/released	43	12	0.3	24	1.1	7	0.6
Hospitalized	14	3	0.1	6	0.3	5	0.4
Permanent injury	7	0	0.0	6	0.3	1	0.1
Killed	27	6	0.1	18	0.8	3	0.3

Table 3

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY WEAPON USE
(October 1, 1989 through September 30, 1990)

WEAPON USE	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	7,638	4,325	100.0	2,150	100.0	1,163	100.0
No weapon or threat	7,316	4,207	97.3	2,014	93.7	1,095	94.2
Threat, no weapon	77	24	0.6	41	1.9	12	1.0
Firearm present and threatened	49	22	0.5	17	0.8	10	0.9
Firearm brandished, no use	83	35	0.8	26	1.2	22	1.9
Firearm discharged	43	16	0.4	17	0.8	10	0.9
Knife present and threatened	2	0	0.0	2	0.1	0	0.0
Knife brandished, no use	3	1	0.0	1	0.1	1	0.1
Knife used	14	3	0.1	10	0.5	1	0.1
Other weapon present	7	1	0.0	4	0.2	2	0.2
Other weapon brandished, no use	1	0	0.0	1	0.1	1	0.0
Other weapon used	19	5	0.1	8	0.4	6	0.5
Explosives threatened or used	24	11	0.3	9	0.4	4	0.3

Table 4

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY SCOPE OF CRIMINAL ACTIVITY
(October 1, 1989 through September 30, 1990)

SCOPE OF CRIMINAL ACTIVITY	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	7,638	4,325	100.0	2,150	100.0	1,163	100.0
Single act	3,931	2,315	53.5	1,052	48.9	564	48.5
Multiple act	2,109	1,182	27.3	589	27.4	338	29.1
Ongoing	1,598	828	19.1	509	23.7	261	22.4

Table 5

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY ROLE IN THE OFFENSE
(October 1, 1989 through September 30, 1990)

ROLE IN THE OFFENSE	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	7,638	4,325	100.0	2,150	100.0	1,163	100.0
Acting Alone	3,350	2,003	46.3	888	41.3	459	39.5
TOTALS	4,288	2,332	100.0	1,262	100.0	704	100.0
More culpable	1,206	620	26.6	390	30.9	196	27.8
Less culpable	1,444	809	34.7	402	31.9	233	33.1
Equal culpability	1,533	838	35.9	437	34.6	258	36.7
Leader	35	15	0.6	16	1.3	4	0.6
Supervisor	23	11	0.5	9	0.7	3	0.4
Worker	47	29	1.2	8	0.6	10	1.4

Table 6

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY OFFENSE LEVEL
(October 1, 1989 through September 30, 1990)

OFFENSE LEVEL	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	9,267	5,330	100.0	2,510	100.0	1,427	100.0
1-6	2,026	1,257	23.6	456	18.2	313	21.9
7-10	1,829	1,113	20.9	459	18.3	257	18.0
11-12	707	408	7.7	205	8.2	94	6.6
13-19	1,408	777	14.6	412	16.4	219	15.4
20-26	1,824	1,015	19.0	516	20.6	293	20.5
27-33	971	525	9.9	287	11.4	159	11.1
34-43	502	235	4.4	175	7.0	92	6.5

Table 7

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY NUMBER OF COUNTS
(October 1, 1989 through September 30, 1990)

NUMBER OF COUNTS	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	9,329	5,360	100.0	2,539	100.0	1,430	100.0
1	7,266	4,259	79.5	1,927	75.9	1,080	75.5
2	1,244	669	12.5	370	14.6	205	14.3
3	350	195	3.6	100	3.9	55	3.9
4	202	108	2.0	55	2.2	39	2.7
5+	267	129	2.4	87	3.4	51	3.6

Table 8

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY SENTENCE TYPE
(October 1, 1989 through September 30, 1990)

SENTENCE TYPE	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	**9,267**	**5,321**	**100.0**	**2,521**	**100.0**	**1,425**	**100.0**
No Prison or Probation	**50**	40	0.8	6	0.2	4	0.3
Probation	**1,884**	1,227	23.1	405	16.1	252	17.7
Probation and Alternative	**978**	636	12.0	206	8.2	136	9.5
Prison only	**211**	119	2.2	65	2.6	27	1.9
Prison & Supervised Release	**5,893**	3,145	59.1	1,769	70.2	979	68.7
Prison & Supervised Release & Alternative	**251**	154	2.9	70	2.8	27	1.9

Table 9

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY LENGTH OF PROBATION
(October 1, 1989 through September 30, 1990)

LENGTH OF PROBATION (in months)	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	2,892	1,878	100.0	624	100.0	390	100.0
1-12	405	292	15.6	68	10.9	45	11.5
13-24	583	398	21.2	109	17.5	76	19.5
25-36	1,261	792	42.2	293	47.0	176	45.1
37-96	643	396	21.1	154	24.7	93	23.9

Table 10

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY LENGTH OF INCARCERATION
(October 1, 1989 through September 30, 1990)

LENGTH OF INCARCERATION (in months)	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	6,293	3,380	100.0	1,888	100.0	1,025	100.0
1-12	1,823	1,018	30.1	515	27.3	290	28.3
13-24	1,058	577	17.1	327	17.3	154	15.0
25-36	594	321	9.5	192	10.2	81	7.9
37-59	567	278	8.2	178	9.4	111	10.8
60-119	1,370	754	22.3	385	20.4	231	22.5
120-Life	881	432	12.8	291	15.4	158	15.4

Table 11

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY SENTENCE RELATIVE TO GUIDELINE RANGE
(October 1, 1989 through September 30, 1990)

SENTENCE RELATIVE TO GUIDELINE RANGE	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	9,027	5,177	100.0	2,455	100.0	1,395	100.0
Below Range	2,469	1,505	29.1	628	25.6	336	24.1
Bottom Of Range	3,417	2,099	40.5	824	33.6	494	35.4
Lower Middle	676	354	6.8	205	8.4	117	8.4
Upper Middle	1,241	678	13.1	391	15.9	174	12.5
Top Of Range	757	336	6.5	258	10.5	163	11.7
Above Range	467	207	4.0	149	6.1	111	8.0

Table 12

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY OFFENDER'S SEX
(October 1, 1989 through September 30, 1990)

OFFENDER'S SEX	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	8,637	4,953	100.0	2,361	100.0	1,323	100.0
Male	6,745	3,616	73.0	2,007	85.0	1,122	84.8
Female	1,892	1,337	27.0	354	15.0	201	15.2

Table 13

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY OFFENDER'S RACE
(October 1, 1989 through September 30, 1990)

OFFENDER'S RACE	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	**8,590**	**4,919**	**100.0**	**2,352**	**100.0**	**1,319**	**100.0**
White	**4,361**	2,459	50.0	1,196	50.9	706	53.5
Black	**2,173**	1,178	24.0	637	27.1	358	27.1
Hispanic	**1,793**	1,153	23.4	427	18.2	213	16.2
Other	**263**	129	2.6	92	3.9	42	3.2

Table 14

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY OFFENDER'S MARITAL STATUS
(October 1, 1989 through September 30, 1990)

OFFENDER'S MARITAL STATUS	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	7,647	4,333	100.0	2,150	100.0	1,164	100.0
Married	3,295	2,039	47.1	825	38.4	431	37.0
Single	2,400	1,290	29.8	704	32.7	406	34.9
Divorced	921	452	10.4	303	14.1	166	14.3
Separated	429	232	5.4	129	6.0	68	5.8
Widow(er)	77	48	1.1	15	0.7	14	1.2
Cohabitation	525	272	6.3	174	8.1	79	6.8

Table 15

CRIMINAL HISTORY CATEGORY I
OFFENDER SUBCATEGORIES BY OFFENDER'S EDUCATION
(October 1, 1989 through September 30, 1990)

OFFENDER'S EDUCATION	TOTAL	SUBCATEGORY					
		First Offenders		Offenders without Criminal History Points		Offenders with One Criminal History Point	
		Number	Percent	Number	Percent	Number	Percent
TOTAL	7,643	4,329	100.0	2,150	100.0	1,164	100.0
None or less than 6 years	532	352	8.1	131	6.1	49	4.2
Elementary	716	382	8.8	219	10.2	115	9.9
Some High School	1,613	751	17.4	528	24.6	334	28.7
Vocational Graduate	100	61	1.4	26	1.2	13	1.1
GED	448	203	4.7	168	7.8	77	6.6
High School Diploma	2,002	1,169	27.0	537	25.0	296	25.4
Some College	1,579	944	21.8	426	19.8	209	18.0
College Graduate	520	372	8.6	92	4.3	56	4.8
Post-Graduate Work	133	95	2.2	23	1.1	15	1.3

Table 16

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII
BY OFFENSE TYPE
(October 1, 1989 through September 30, 1990)

PRIMARY OFFENSE	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,462	100.0	475	100.0	987	100.0	653	100.0	809	100.0
Homicide	3	0.2	2	0.4	1	0.1	2	0.3	1	0.1
Kidnapping	3	0.2	1	0.2	2	0.2	1	0.2	2	0.3
Robbery	217	14.8	84	17.7	133	13.5	106	16.2	111	13.7
Assault	21	1.4	6	1.3	15	1.5	7	1.1	14	1.7
Burglary/B&E	11	0.8	3	0.6	8	0.8	4	0.6	7	0.9
Larceny	85	5.8	17	3.6	68	6.9	31	4.8	54	6.7
Embezzlement	5	0.3	1	0.2	4	0.4	2	0.3	3	0.4
Tax Offenses	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Fraud	94	6.4	33	7.0	61	6.2	49	7.5	45	5.6
Drug Importation & Distribution	488	33.4	168	35.4	320	32.4	208	31.9	280	34.6
Drug Simple Possession	21	1.4	4	0.8	17	1.7	4	0.6	17	2.1
Drug Communication Facility	5	0.3	1	0.2	4	0.4	2	0.3	3	0.4
Auto Theft	10	0.7	3	0.6	7	0.7	6	0.9	4	0.5
Forgery/Counterfeiting	36	2.5	11	2.3	25	2.5	16	2.5	20	2.5
Sex Offenses	8	0.6	3	0.6	5	0.5	5	0.8	3	0.4
Bribery	1	0.1	0	0.0	1	0.1	0	0.0	1	0.1
Escape	83	5.7	21	4.4	62	6.3	40	6.1	43	5.3
Firearms	200	13.7	71	15.0	129	13.1	98	15.0	102	12.6
Immigration	130	8.9	37	7.8	93	9.4	58	8.9	72	8.9
Extortion/Racketeering	11	0.8	3	0.6	8	0.8	4	0.6	7	0.9
Gambling/Lottery	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Money Laundering	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Other	30	2.1	6	1.3	24	2.4	10	1.5	20	2.5

Table 17

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY ROLE IN THE OFFENSE (October 1, 1989 through September 30, 1990)

ROLE IN THE OFFENSE	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,331	100.0	413	100.0	918	100.0	574	100.0	757	100.0
Acted Alone	757	56.9	234	56.7	523	57.0	353	61.5	404	53.4
TOTAL	574	100.0	179	100.0	395	100.0	221	100.0	353	100.0
More Culpable	258	45.0	75	41.9	183	46.3	100	45.3	158	44.8
Less Culpable	91	15.9	27	15.1	64	16.2	30	13.6	61	17.3
Equally Culpable	197	34.3	74	41.3	126	31.9	83	37.6	114	32.3
Leader	16	2.8	4	2.2	12	3.0	4	1.8	12	3.4
Supervisor	5	0.9	1	0.6	4	1.0	1	0.5	4	1.1
[illegible]er	7	1.2	1	0.6	6	1.5	3	1.4	4	1.1

Table 18

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY OFFENSE LEVEL (October 1, 1989 through September 30, 1990)

OFFENSE LEVEL	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,256	100.0	499	100.0	757	100.0	689	100.0	567	100.0
1-6	171	13.6	53	10.6	118	15.6	88	12.8	83	14.6
7-10	253	20.1	97	19.4	156	20.6	139	20.2	114	20.1
11-12	122	9.7	45	9.0	77	10.2	75	10.9	47	8.3
13-19	148	11.8	47	9.4	101	13.3	70	10.2	78	13.8
20-26	111	8.8	46	9.2	65	8.6	66	9.6	45	7.9
27-33	259	20.6	117	23.5	142	18.8	142	20.6	117	20.6
34-43	192	15.3	94	18.8	98	13.0	109	15.8	83	14.6

Table 19

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY LENGTH OF INCARCERATION (October 1, 1989 through September 30, 1990)

LENGTH OF INCARCERATION	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,530	100.0	498	100.0	1,032	100.0	687	100.0	843	100.0
1 - 12	192	12.6	33	6.6	159	15.4	57	8.3	135	16.0
13 - 24	273	17.8	92	18.5	181	17.5	126	18.3	147	17.4
25 - 36	171	11.2	58	11.7	113	11.0	90	13.1	81	9.6
37 - 59	137	9.0	34	6.8	103	10.0	52	7.6	85	10.1
60 - 119	204	13.3	64	12.9	140	13.6	83	12.1	121	14.4
120 - LIFE	553	36.1	217	43.6	336	32.6	279	40.6	274	32.5

Table 20

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY SENTENCE RELATIVE TO GUIDELINE RANGE
(October 1, 1989 through September 30, 1990)

SENTENCE RELATIVE TO RANGE	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,176	100.0	485	100.0	691	100.0	666	100.0	510	100.0
BELOW RANGE	180	15.3	83	17.1	97	14.0	105	15.8	75	14.7
BOTTOM OF RANGE	279	23.7	120	24.7	159	23.0	160	24.0	119	23.3
LOWER MIDDLE	94	8.0	43	8.9	51	7.4	55	8.3	39	7.7
UPPER MIDDLE	173	14.7	80	16.5	93	13.5	107	16.1	66	12.9
TOP OF RANGE	275	23.4	95	19.6	180	26.1	142	21.3	133	26.1
ABOVE RANGE	175	14.9	64	13.2	111	16.1	97	14.6	78	15.3

Table 21

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY CAREER OFFENDER
(October 1, 1989 through September 30, 1990)

CAREER OFFENDER	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,537	100.0	498	100.0	1,039	100.0	687	100.0	850	100.0
CAREER OFFENDER NOT APPLIED	1,071	69.7	288	57.8	783	75.4	441	64.2	630	74.1
CAREER OFFENDER APPLIED	466	30.3	210	42.2	256	24.6	246	35.8	220	25.9

Table 22

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY COMMISSION OF INSTANT OFFENSE UNDER CRIMINAL JUSTICE SENTENCE (October 1, 1989 through September 30, 1990)

UNDER CRIMINAL JUSTICE SENTENCE	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,534	100.0	497	100.0	1,037	100.0	685	100.0	849	100.0
NOT UNDER CRIMINAL JUSTICE SENTENCE	455	29.7	172	34.8	283	27.3	211	30.8	244	28.7
UNDER CRIMINAL JUSTICE SENTENCE (+2 CRIMINAL HISTORY POINTS)	1,079	70.3	325	65.4	754	72.7	474	69.2	605	71.3

Table 23

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY COMMISSION OF INSTANT OFFENSE WITHIN TWO YEARS OF RELEASE (October 1, 1989 through September 30, 1990)

WITHIN TWO YEARS OF RELEASE	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,535	100.0	497	100.0	1,038	100.0	686	100.0	849	100.0
INSTANT OFFENSE NOT WITHIN TWO YEARS OF RELEASE	557	36.3	170	34.2	387	37.3	205	29.9	352	41.5
INSTANT OFFENSE WITHIN TWO YEARS OF RELEASE (+1 CRIMINAL HISTORY POINT)	785	51.1	248	49.9	537	51.7	377	55.0	408	48.1
INSTANT OFFENSE WITHIN TWO YEARS OF RELEASE (+2 CRIMINAL HISTORY POINTS)	193	12.6	79	15.9	114	11.0	104	15.2	89	10.5
						—				

Table 24

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY CRIMINAL JUSTICE STATUS (October 1, 1989 through September 30, 1990)

CRIMINAL JUSTICE STATUS	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,331	100.0	413	100.0	918	100.0	574	100.0	757	100.0
NONE	348	26.2	121	29.3	227	24.7	147	25.6	201	26.6
PAROLE WARRANT OUT	379	28.5	134	32.5	245	26.7	194	33.8	185	24.4
ON BAIL	36	2.7	12	2.9	24	2.6	18	3.1	18	2.4
CUSTODY/SERVE SENTENCE	132	9.9	30	7.3	102	11.1	56	9.8	76	10.0
CUSTODY/AWAIT TRIAL	9	0.7	3	0.7	6	0.7	6	1.1	3	0.4
ESCAPE	52	3.9	15	3.6	37	4.0	20	3.5	32	4.2
BAIL JUMP	27	2.0	6	1.5	21	2.3	12	2.1	15	2.0
MULTIPLE JURISDICTIONS	61	4.6	19	4.6	42	4.6	27	4.7	34	4.5
PROBATION/BENCH WARRANT	270	20.3	64	15.5	206	22.4	85	14.8	185	24.4
PRETRIAL DIVERSION	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
OTHER WARRANT OUTSTANDING	17	1.3	9	2.2	8	0.9	9	1.6	8	1.1

Table 25

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY NUMBER OF PRIOR ADULT CONVICTIONS (October 1, 1989 through September 30, 1990)

NUMBER OF PRIOR ADULT CONVICTIONS	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,343	100.0	414	100.0	929	100.0	577	100.0	766	100.0
2	114	8.5	21	5.1	93	10.0	22	3.8	92	12.0
3	133	9.9	34	8.2	99	10.7	36	6.2	97	12.7
4	124	9.2	64	15.5	60	6.5	65	11.3	59	7.7
5	135	10.1	54	13.0	81	8.7	70	12.1	65	8.5
6	132	9.8	58	14.0	74	8.0	80	13.9	52	6.8
7	118	8.8	41	9.9	77	8.3	62	10.8	56	7.3
8	89	6.6	23	5.6	66	7.1	44	7.6	45	5.9
9 or More	409	30.5	113	27.3	296	31.9	187	32.4	222	29.0
Unknown or Missing	89	6.7	6	1.4	83	9.0	11	1.9	78	10.2

Table 26

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY NUMBER OF INCARCERATIONS FOR A TERM OF 5 YEARS OR LONGER (October 1, 1989 through September 30, 1990)

NUMBER OF INCARCERATIONS FOR 5 YEARS OR LONGER	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,343	100.0	414	100.0	929	100.0	577	100.0	766	100.0
0	788	58.7	222	53.6	566	60.9	311	53.9	477	62.3
1	267	19.9	95	23.0	172	18.5	134	23.2	133	17.4
2	128	9.5	47	11.4	81	8.7	66	11.4	62	8.1
3	85	6.3	26	6.8	57	6.1	36	6.2	49	6.4
4 OR MORE	75	5.6	22	5.3	53	5.7	30	5.2	45	5.9

Table 27

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY NUMBER OF INCARCERATIONS FOR A TERM OF 1 TO 5 YEARS (October 1, 1989 through September 30, 1990)

NUMBER OF INCARCERATIONS FROM 1 TO 5 YEARS	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,343	100.0	414	100.0	929	100.0	577	100.0	766	100.0
0	336	25.0	69	16.7	267	28.7	88	15.3	248	32.4
1	337	25.1	120	29.0	217	23.4	152	26.3	185	24.2
2	276	20.6	114	27.5	162	17.4	149	25.8	127	16.6
3	166	12.4	55	13.3	111	12.0	92	15.9	74	9.7
4 OR MORE	228	17.0	56	13.5	172	18.5	96	16.6	132	17.2

Table 28

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY NUMBER OF INCARCERATIONS FOR A TERM OF 31 DAYS TO 1 YEAR (October 1, 1989 through September 30, 1990)

NUMBER OF INCARCERATIONS FOR A TERM OF 31 DAYS TO 1 YEAR	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,343	100.0	414	100.0	929	100.0	577	100.0	766	100.0
0	530	39.5	145	35.0	385	41.4	181	31.4	349	45.6
1	304	22.6	107	25.9	197	21.2	139	24.1	165	21.5
2	180	13.4	65	15.7	115	12.4	90	15.6	90	11.8
3	110	8.2	39	9.4	71	7.6	58	10.1	52	6.8
4 OR MORE	219	16.3	58	14.0	161	17.3	109	18.9	110	14.4

Table 29

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY NUMBER OF PRIOR REVOCATIONS (October 1, 1989 through September 30, 1990)

NUMBER OF PRIOR REVOCATIONS	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,331	100.0	413	100.0	918	100.0	574	100.0	757	100.0
0	472	35.5	125	30.3	347	37.8	159	27.7	313	41.4
1	265	19.9	91	22.0	174	19.0	119	20.7	146	19.3
2	158	11.9	49	11.9	109	11.9	75	13.1	83	11.0
3	98	7.4	38	9.2	60	6.5	49	8.5	49	6.5
4 OR MORE	338	25.4	110	26.6	228	24.8	172	30.0	166	21.9

Table 30

ALTERNATE CRIMINAL HISTORY CATEGORIES VI AND VII BY NUMBER OF PRIORS SIMILAR TO INSTANT OFFENSE (October 1, 1989 through September 30, 1990)

NUMBER OF SIMILAR PRIORS	CURRENT CATEGORY VI (13 and up) TOTAL		OPTION I				OPTION II			
			CATEGORY VI (13-15)		CATEGORY VII (16 and up)		CATEGORY VI (13-19)		CATEGORY VII (20 and up)	
	N	%	N	%	N	%	N	%	N	%
TOTAL	1,343	100.0	414	100.0	929	100.0	577	100.0	766	100.0
0	604	45.0	164	39.6	440	47.4	232	40.2	372	48.6
1	267	19.9	80	19.3	187	20.1	111	19.2	156	20.4
2	205	15.3	78	18.8	127	13.7	94	16.3	111	14.5
3	102	7.6	39	9.4	63	6.8	54	9.4	48	6.3
4 OR MORE	165	12.3	53	12.8	112	12.1	86	14.9	79	10.3

Table 31

DISTRIBUTION OF SAMPLE CASES BY INSTANT OFFENSE TYPE
(October 1, 1989 through September 30, 1990)

OFFENSE TYPE	Number	Percent
TOTAL	296	100.0
Controlled Substance Offense	170	57.4
Robbery	93	31.4
Firearms	15	5.1
Other	18	6.1

Table 32

DISTRIBUTION OF SAMPLE CASES BY SCOPE OF ACTIVITY
(October 1, 1989 through September 30, 1990)

SCOPE OF ACTIVITY	Number	Percent
TOTAL	263	100.0
Single Acts	120	45.6
Multiple Acts	66	25.1
Ongoing Behavior	77	29.3

Table 33

DISTRIBUTION OF SAMPLE CASES BY INVOLVEMENT IN THE OFFENSE
(October 1, 1989 through September 30, 1990)

INVOLVEMENT IN THE OFFENSE	Number	Percent
TOTAL	263	100.0
Acting Alone	117	44.5
TOTAL	146	100.0
More Culpable	73	50.0
Equal Culpability	17	11.6
Less Culpable	51	34.9
Leader	3	2.1
Supervisor	1	0.7
Worker	1	0.7

Table 34

DISTRIBUTION OF SAMPLE CASES BY ROLE IN A DRUG OFFENSE
(October 1, 1989 through September 30, 1990)

ROLE IN THE OFFENSE	Number	Percent
TOTAL	170	100.0
Peripheral Role	1	0.6
Minor Role	4	2.4
Courier	11	6.5
Sells to User	59	34.7
Deals Above Street Level	88	51.8
Leader	7	4.1

Table 35

DISTRIBUTION OF SAMPLE CASES BY FIRST PRIOR CONVICTION FOR A CONTROLLED SUBSTANCE OR VIOLENT OFFENSE (October 1, 1989 through September 30, 1990)

OFFENSE TYPE	Number	Percent
TOTAL	301	100.0
Homicide	2	0.7
Kidnapping	1	0.3
Robbery	73	24.3
Assault	34	11.3
Sex Offenses	5	1.7
Extortion	1	0.3
Burglary (Resendential)	44	14.6
Burglary (Other)	27	9.0
Drugs (Distribution)	75	24.9
Drugs (Possession)	18	6.0
Other	21	7.0

Force in Conduct* Used in: 57.2% of cases

Force in Generic* Used in: 60.1% of cases

*Refers to the use of force; dangerous weapon or threat of force in the "real offense" conduct, or in the generic elements of the crime.

Table 36

DISTRIBUTION OF SAMPLE CASES BY SECOND PRIOR CONVICTION FOR A CONTROLLED SUBSTANCE OR VIOLENT OFFENSE
(October 1, 1989 through September 30, 1990)

OFFENSE TYPE	Number	Percent
TOTAL	301	100.0
Homicide	3	1.0
Kidnapping	2	0.7
Robbery	81	26.9
Assault	17	5.7
Sex Offenses	5	1.7
Burglary (Resendential)	35	11.6
Burglary (Other)	20	6.6
Drugs (Distribution)	86	28.6
Drugs (Possession)	24	8.0
Other	28	9.3

Force in Conduct* Used in: 54.2% of cases

Force in Generic* Used in: 56.5% of cases

*Refers to the use of force; dangerous weapon or threat of force in the "real offense" conduct, or in the generic elements of the crime.

Table 37

DISTRIBUTION OF SAMPLE CASES BY THIRD PRIOR CONVICTION FOR A CONTROLLED SUBSTANCE OR VIOLENT OFFENSE
(October 1, 1989 through September 30, 1990)

OFFENSE TYPE	Number	Percent
TOTAL	301	100.0
None	101	33.6
Robbery	53	17.6
Assault	19	6.3
Sex offenses	8	2.7
Extortion	1	0.3
Burglary (Resendential)	20	6.6
Burglary (Other)	13	4.3
Drugs (Distribution)	45	15.0
Drugs (Possession)	19	6.3
Other	22	7.3

Force in Conduct* Used in: 64.9% of cases

Force in Generic* Used in: 62.4% of cases

*Refers to the use of force; dangerous weapon or threat of force in the "real offense" conduct, or in the generic elements of the crime.

Table 38

DISTRIBUTION OF SAMPLE CASES BY FOURTH PRIOR CONVICTION FOR A CONTROLLED SUBSTANCE OR VIOLENT OFFENSE
(October 1, 1989 through September 30, 1990)

OFFENSE TYPE	Number	Percent
TOTAL	301	100.0
None	182	60.5
Homicide	1	0.3
Robbery	39	13.0
Assault	11	3.7
Sex Offenses	2	0.7
Extortion	1	0.3
Burglary (Resendential)	7	2.3
Burglary (Other)	8	2.7
Drugs (Distribution)	27	9.0
Drugs (Possession)	10	3.3
Other	13	4.3

Force in Conduct* Used in: 70.3% of cases

Force in Generic* Used in: 64.9% of cases

*Refers to the use of force; dangerous weapon or threat of force in the "real offense" conduct, or in the generic elements of the crime.

Table 39

DISTRIBUTION OF SAMPLE CASES BY FIFTH PRIOR CONVICTION FOR A CONTROLLED SUBSTANCE OR VIOLENT OFFENSE
(October 1, 1989 through September 30, 1990)

OFFENSE TYPE	Number	Percent
TOTAL	301	100.0
None	253	84.1
Homicide	1	0.3
Robbery	14	4.7
Assault	7	2.3
Burglary (Resendential)	2	0.7
Burglary (Other)	2	0.7
Drugs (Distribution)	11	3.7
Drugs (Possession)	4	1.3
Other	7	2.3

Force in Conduct* Used in: 66.7% of cases

Force in Generic* Used in: 83.8% of cases

*Refers to the use of force; dangerous weapon or threat of force in the "real offense" conduct, or in the generic elements of the crime.

Table 40

DISTRIBUTION OF SAMPLE CASES BY NUMBER OF PRIOR ADULT CONVICTIONS
(October 1, 1989 through September 30, 1990)

NUMBER OF PRIOR ADULT CONVICTIONS	Number	Percent
TOTAL	301	100.0
2	28	9.3
3	48	16.0
4	49	16.3
5	32	10.6
6	29	9.6
7	29	9.6
8	13	4.3
9	17	5.7
10	12	4.0
11	16	5.3
12 or More	28	9.3

Table 41

DISTRIBUTION OF SAMPLE CASES BY NUMBER AND LENGTH OF PRIOR INCARCERATIONS
(October 1, 1989 through September 30, 1990)

NUMBER OF INCARCERATIONS	LENGTH OF INCARCERATION					
	5 Years or More		1 to 5 Years		31 days to 1 Year	
	Number	Percent	Number	Percent	Number	Percent
TOTAL	263	100.0	263	100.0	263	100.0
0	121	46.0	63	24.0	123	46.8
1	64	24.3	68	25.9	64	24.3
2	37	14.1	67	25.5	36	13.7
3	21	8.0	26	9.9	15	5.7
4	9	3.4	17	6.5	10	3.8
5 or More	11	4.2	22	8.4	15	5.7
				—		

Table 42

DISTRIBUTION OF SAMPLE CASES BY NUMBER OF PRIOR REVOCATIONS
(October 1, 1989 through September 30, 1990)

NUMBER OF PRIOR REVOCATIONS	Number	Percent
TOTAL	263	100.0
0	85	32.3
1	41	15.6
2	33	12.6
3	26	9.9
4	27	10.3
5 or More	51	19.4
		—

Table 43

DISTRIBUTION OF SAMPLE CASES BY NUMBER OF CONVICTED COUNTS IN INSTANT OFFENSE
(October 1, 1989 through September 30, 1990)

NUMBER OF CONVICTED COUNTS	Number	Percent
TOTAL	301	100.0
1	153	50.8
2	70	23.3
3	35	11.6
4	18	6.0
5 or More	25	8.3

Table 44

DISTRIBUTION OF SAMPLE CASES BY MODE OF CONVICTION
(October 1, 1989 through September 30, 1990)

MODE OF CONVICTION	Number	Percent
TOTAL	296	100.0
Plea	187	63.2
Trial	109	36.8

Table 45

DISTRIBUTION OF SAMPLE CASES BY OFFENSE LEVELS WITH AND WITHOUT CAREER OFFENDER APPLIED
(October 1, 1989 through September 30, 1990)

OFFENSE LEVELS	OFFENSE LEVEL PRIOR TO CAREER OFFENDER APPLIED		OFFENSE LEVEL AFTER CAREER OFFENDER APPLIED	
	Number	Percent	Number	Percent
TOTALS	298	100.0	299	100.0
5	1	0.3	0	0.0
6	1	0.3	0	0.0
7	3	1.0	0	0.0
8	4	1.3	0	0.0
9	3	1.0	0	0.0
10	10	3.4	2	0.7
12	9	3.0	2	0.7
13	1	0.3	0	0.0
14	8	2.7	0	0.0
15	0	0.0	5	1.7
16	7	2.4	0	0.0
17	20	6.7	3	1.0
18	11	3.7	0	0.0
19	9	3.0	0	0.0
20	27	9.1	0	0.0
21	9	3.0	1	0.3
22	16	5.4	7	2.3
23	8	2.7	1	0.3
24	30	10.1	2	0.7
25	7	2.4	1	0.3
26	22	7.4	0	0.0
27	1	0.3	1	0.3
28	9	3.0	0	0.0
29	4	1.3	3	1.0
30	21	7.1	69	23.1
31	3	1.0	0	0.0
32	15	5.0	72	24.1
33	1	0.3	0	0.0
34	15	5.0	48	16.1
35	2	0.7	26	8.7
36	11	3.7	2	0.7
37	2	0.7	50	16.7
38	5	1.7	2	0.7
40	1	0.3	1	0.3
42	1	0.3	0	0.0
47	1	0.3	1	0.3

Table 48

DISTRIBUTION OF SAMPLE CASES BY OFFENDER'S SEX
(October 1, 1989 through September 30, 1990)

OFFENDER'S SEX	Number	Percent
TOTAL	284	100.0
Male	279	98.2
Female	5	1.8

Table 49

DISTRIBUTION OF SAMPLE CASES BY OFFENDER'S RACE
(October 1, 1989 through September 30, 1990)

OFFENDER'S RACE	Number	Percent
TOTAL	282	100.0
White	113	40.1
Black	137	48.6
White Hispanic	23	8.2
Black Hispanic	5	1.8
Other	4	1.4

Table 50

DISTRIBUTION OF SAMPLE CASES BY DEFENDANT'S AGE
(October 1, 1989 through September 30, 1990)

PERCENT OF CASES	DEFENDANT'S AGE
First Quartile (25 percent)	31
Second Quartile (50 percent)	36
Third Quartile (75% percent)	42

Table 46

DISTRIBUTION OF SAMPLE CASES BY DEPARTURE STATUS
(October 1, 1989 through September 30, 1990)

DEPARTURE STATUS	Number	Percent
TOTAL	294	100.0
None	193	65.7
Upward	6	2.0
Downward	72	24.5
Apparent	23	7.8

Table 47

DISTRIBUTION OF SAMPLE CASES BY TERM OF IMPRISONMENT IMPOSED
(October 1, 1989 through September 30, 1990)

IMPRISONMENT IN YEARS	Number	Percent
TOTAL	301	100.0
Up to 5 Years	29	9.6
5 to 10 Years	33	11.0
10 to 15 Years	57	18.9
15 to 20 Years	59	19.6
20 to 25 Years	50	16.6
25 to 30 Years	18	6.0
30 to 35 Years	25	8.3
35 Years and Over	30	10.0

CAREER OFFENDER CASE FILE SUMMARY
NARROWING FACTORS

Coder _____
QC _____
Case No. _____

Current Offense

101 USSC Identification Number _____

102 Statute(s) of Conviction _____ _____ _____ _____
(Include Penalty Enhancement Statutes)

103 Statutory Maximum _____ _____ _____ _____

104 Do Mandatory Minimums Apply? Yes _____ years No _____

105 Brief Summary of Offense

_____

_____

_____

106 Age of Offender at Time of Offense _____ years

107 Role of the Drug Offender (Circle one)

P -- Peripheral Role C -- Courier D - Deals Above Street Level/Manufacturer U -- Unknown
M -- Minor Role S -- Sells to User L - Leader/Highest Level Dealer N -- Not Drugs

Range and Sentence

200 Guideline(s) Applied for Substantive Offense _____ _____ _____

201 Guideline Total Level and Range level _____ _____ months

202 Career Offender Total Level and Range level _____ _____ months

203 Sentence Imposed _____ months

204 Departure Entered

U -- Upward Departure
D -- Downward Departure
A -- Apparent Departure
N -- No Departure

Basis for Departure _____

Instant COV/CSO

300 Offense	Juris-diction	Date Commenced	Date of Sentence	Force in Conduct?**	Force in Generic?**
_____					

Prior Offenses

400 Total Number of Priors _____

401 COV/CSO (Describe)	Juris-diction	Date of Sentence	Date of Release	Date Out Of System	Force in Conduct?	Force in Generic?	Related Cases?
_____							
_____							
_____							
_____							
_____							

402 Most Recent Felony Offense	Juris-diction	Date of Sentence	Date of Release	Date Out of System
_____				

403 Indicate using an " * " priors counted by the court for career offender purposes.

"Force in Conduct" -- (Indicate only one) --
W -- Offense Conduct Involved Dangerous Weapon
F -- Offense Conduct Involved Use of Force
T -- Offense Conduct Involved Threat of Use of Force
CSO- Offense Conduct Involved CSO With No Force
N -- Offense Conduct Did Not Involve Use or Threat
U -- Unknown

"Force in Generic" (Indicate only one) --
W -- Generic Offense Involved Use of Dangerous Weapon
F -- Generic Offense Involved Use of Force
T -- Generic Offense Involved Threatened Use of Force
CSO- Generic Offense Involved CSO With No Force
N -- Generic Offense Did Not Involve Use or Threat
U -- Unknown

"Related Cases"
SO -- Prior Occurred with Another on Single Occasion
SCS -- Prior Occurred with Another as Part of Single Common Scheme or Plan
C -- Prior Consolidated with Another for Sentencing
N -- Prior Not Related to Another
U -- Unknown

Criminal History

500 Criminal History Points _____
501 Criminal History Category _____

Application of Career Offender (Circle any that apply)

600 Ratcheting (list other offense or provision) _____
601 Related Cases Counted Separately (list offenses) _____
602 Apparent Misapplication of Career Offender Rules (explain) _____
603 Used "Actual Offense" Analysis to Determine Nature of Instant or Prior Conviction

Court Comments (Circle any that apply)

700 Career Offender Range Considered Excessive
701 Career Offender Range Considered Insufficient
702 Court Commented on Rules Used to Apply Career Offender
703 Court Recommended Alternative Rules
704 Court Comments Not Available
705 Court Comments Available, but None Made Regarding Career Offender
706 Quote Relevant Comments _____
_____

Miscellaneous

900 Career Offender Recommended but not Used in Sentencing
901 Comments _____

CODING DIRECTIONS

CAREER OFFENDER CASE FILE SUMMARY
NARROWING FACTORS

"Coder" Put your initials here.
"QC" Person Quality Controlling puts initials here.

Current Offense

100 Leave this blank.

101 Fill in USSC case file identification number.

102 List all statutes of conviction, including penalty enhancement statutes (such as 18:924(e)). However, if there are an multiple counts of conviction that are duplicative (multiple 21:841 counts), only list the most serious offense.

103 List all statutory maxima applicable to the statutes listed in line 102.

104 Note whether a mandatory minimum sentence otherwise applied, and the number of years.

105 Briefly summarize the offense conduct, with particular attention to mitigating or aggravating factors (e.g., use of a firearm or dangerous weapon; extreme use of force; lack of ability actually to carry out threatened use of force). Note role in the offense, where relevant.

106 Note the age of the offender at the time of commencement of the relevant conduct.

107 If the relevant conduct involved drug-related conduct, note the particular role in the offense played by the offender. Do not necessarily rely on whether or not a Chapter 3 adjustment for role was given. For example, someone you determine to be a courier or otherwise a minor player, may not have received a reduction for minor role. The categories of offender provided generally include the following persons:

Peripheral Role (P): virtually no role in the offense, including a person who merely received a package on behalf of another, went along for a ride, etc.

Minor (M): minimal or minor role in the offense, including a person relayed messages to a dealer on multiple occasions, permitted the use of an apartment for drug dealing without profit, unloaded one load, or otherwise was involved tangentially, and in only a single event.

Courier (C): carried drugs within or on the body, or assisted in some other way in the transportation of the drugs, but was not apparently a dealer or seller.

Sells to User (S): sells in small quantities directly to the user.

Deals Above Street Level or Manufactures (D): sells in large quantities to other dealers or street-level dealers, or manufactures or grows drugs in substantial quantities.

Leader/Highest Level Dealer (L): sells in, manufactures, or grows quantities at the top of the guideline drug quantity chart; or leads, directs, or otherwise runs a significant drug operation/conspiracy.

No Drugs (N): this case was not a drug case.

Range and Sentence

200 List all guidelines applied in determining the pre-career offender guideline range for the offense.

201 Provide the total offense level determined using the pre-career offender guideline; and provide the relevant guideline range. Use the SOR or sentencing transcript where possible -- only use the PSI if these are not available. Any abbreviated format such as 12(12-18) (signifying total offense level 12, guideline range 12 to 18 months) is sufficient.

202 Provide the total offense level determining using the career offender provisions, and the relevant range. Follow the instructions in line 201 with respect to use of the SOR and abbreviations.

203 Provide the sentence imposed. In the event a split sentence, CTC, or home confinement is imposed, note the specific terms.

204 Note whether a departure was entered, using the SOR where possible. Indicate the direction of the departure, and summarize the basis. Where the sentence imposed inexplicably appeared outside the guideline range, note this.

Instant COV/CSO

300 **Offense:** indicate the instant offense that was considered the requisite COV or CSO for purposes of the career offender provision. If more than one COV/CSO applies, list each offense.

Date Committed: list the date the relevant conduct of the offense commenced.

Date of Sentence: list the date the offender was sentenced.

Force in Conduct: indicate the extent to which force was used in the instant real offense conduct. "Dangerous weapon" includes any firearm, explosive, destructive device, bomb, knife, or other instrument, but does not include a fist. A dangerous weapon is "used" when it is fired, brandished or displayed, threatened, carried or possessed, or otherwise involved during the commission of a crime to the extent that a reasonable 18:924(c) conviction is likely to be sustained. However, a felon in possession offense should not be considered to involve use of a weapon. Indicate only the most severe category involved.

Force in Generic: indicate the extent to which force was used in the generic crime, that is, looking only at the elements of the crime, and not the underlying facts of the crime. See the above paragraph for further details.

Prior Offenses

400 Count the total number of adult prior convictions listed in the criminal history section of the PSI, including all violent, non-violent, drug distribution and drug possession offenses, whether misdemeanor or felony, unless the offense would be excluded under §4A1.2(c)(2). Do count "old" or "decayed" convictions that would not otherwise be counted for criminal history purposes. Be certain not to include priors listed as criminal conduct that are actually State convictions for the instant offense. If the offender has more than five qualifying priors, attach a separate sheet with a complete listing.

401 **CSO or COV:** List the CSO and COV's appearing in the adult criminal history of the defendant. See the supplementary instructions for definitions of these terms. List the offenses in chronological order with the oldest conviction first (as most PSI's do).

Jurisdiction of Conviction: indicate the State of conviction, or indicate a federal conviction.

Date of Sentence: list the original date when the offender was sentenced. If the offender was sentenced, released, and resentenced (e.g., for a violation of terms of parole or probation), still list the original date of sentencing, NOT the date of resentencing, and note the fact in line 900 (Miscellaneous -- Comments).

Date of Release: list the date the offender was finally released from his term of imprisonment for the offense. If the defendant was never released from his term of imprisonment following a particular offense, indicate so with a notation such as "Not out." If the defendant was placed on probation without a term of imprisonment, and was never resentenced to prison, indicate so with a notation such as "Prob."

Date Out Of System: list the date the offender was finally released from the system, including the date after which all parole, probation, and supervised release obligations were terminated. If the defendant never left the criminal justice system following a particular offense, indicate so with a notation such as "Not out."

Force in Conduct: indicate the extent to which force was used in the instant real offense conduct. "Dangerous weapon" includes any firearm, explosive, destructive device, bomb, knife, or other instrument, but does not include a fist. A dangerous weapon is "used" when it is fired, brandished or displayed, threatened, carried or possessed, or otherwise involved during the commission of a crime to the extent that a reasonable 18:924(c) conviction is likely to be sustained. However, a felon in possession offense should not be considered to involve use of a weapon. Indicate only the most severe category involved.

Force in Generic: indicate the extent to which force was used in the generic crime, that is, looking only at the elements of the crime, and not the underlying facts of the crime. See the above paragraph for further details.

Related Cases: indicate whether the prior was related to any other priors. See Application Note 3 to §4A1.2 for definitions, and see the new consolidated cases guideline.

402 Indicate the most recent felony conviction (including a conviction for a COV or CSO or other offense), the jurisdiction in which it was prosecuted, the date of original sentencing, the final date of release, and the final date out of the system.

403 Place an * to indicate priors counted by the court in qualifying the defendant for career offender status.

Criminal History

500 List number of criminal history points, using the SOR where possible.

501 List criminal history category, using the SOR where possible.

Application of Career Offender

600 Note whether ratcheting occurred -- that is, whether the career offender provision was used in conjunction with, not the statute of conviction, but the penalty enhancement provision (particularly the Armed Career Criminal provision at 18:924(e)). List the other offense or penalty enhancement provision.

601 Indicate whether the court separated related cases and counted them separately for purposes of providing two qualifying prior convictions. List the offenses.

602 Note whether the career offender rules appear to have been misapplied in some way. Do not consider as a misapplication a court's determination that a 18:922(g) offender is a violent criminal.

603 Note type of analysis used to determine whether prior conviction qualifies. Generic offense analysis looks only to the elements of the offense of conviction, while actual offense analysis looks to the underlying real offense conduct.

Court Comments

700 Note whether the court considered the career offender range to be excessive. Quote relevant comments on line 705.

701 Note whether the court considered the career offender range to be insufficient. Quote relevant comments on line 705.

702 Note whether the court commented on any aspect of the career offender rules. Quote relevant comments on line 705.

703 Note whether the court recommended alternative career offender rules. Quote relevant comments on line 705.

704 Note whether no documents were provided which would indicate the court's perspective on the above issues. This category should not be circled where sentencing transcripts, statements of reasons, or other documents are available, but silent on the matter.

705 Quote relevant comments on the above issues, or other relevant issues, including comments appearing in defendant's objections to the PSI, PSI, SOR, transcript, etc. –

Miscellaneous

900 Include any additional comments you might have.

Crime of Violence (COV):

Any felony offense where the use or threatened use of force against a person is an element of the generic crime. Typically includes homicides, sex offenses, robbery, aggravated crimes, assaults and batteries (other than simple assault and battery), residential burglary (not vehicular or office burglaries). Include attempts and conspiracies to commit a violent felony. Do not count misdemeanor offenses. See §4B1.2 for a definition. Where the offense is listed only as a burglary, and the facts of the prior conviction do not indicate whether the crime was residential or office/storehouse, then do not count the burglary as a COV.

Controlled Substance Offense (CSO):

Any felony offense involving controlled substances. Do not count misdemeanor offenses. See §4B1.2 for a definition. In the absence of specific information indicating the misdemeanor or felony nature of the offense, assume that all distribution, manufacture, importation, possession with intent to distribute, (and attempts or conspiracies to do these offenses), are CSO's. Further, assume that simple possession is not a felony, in the absence of more specific information.

Counting Priors:

Sometimes the PSI lists offenses which were charged, and in a second column lists offenses which were convicted. Be certain only to consider offenses of conviction.

CAREER OFFENDER CASE FILE SUMMARY
MODIFYING DECAY FACTOR

Coder _____
QC ____
Case No. _____

100 USSC Identification Number _____

Prior Offenses

200 Controlled Substance Offenses and Crimes of Violence	Juris-diction	Date of Sentence	Date of Release	10-year Rule Excluded	15-year Rule Excluded	Not Excluded

201 Number of **KNOWN COV and CSO** Prior Convictions (Not Related) _____
(Drug Distribution/Sale, Homicide,
Forcible Sex Crimes, Robbery, Residential Burglary)

202 Number of **POSSIBLE COV and CSO** Prior Convictions (Not Related) _____
(Felony Drug Possession, Commercial Burglary, Non-"Simple Assault," Battery,
Threatening Communications, Extortion, Involuntary Manslaughter)

203 Total Number of **ALL** Prior Convictions (Exclude only minor Misdemeanors) _____

204 **SCREEN OUTS:** (Circle the one that applies)

(1) -- The SUM of lines 201 and 202 is zero or one -- SCREEN OUT

(2) -- The defendant was sentenced as a Career Offender -- SCREEN OUT

(3) -- The instant offense is not a COV/CSO -- SCREEN OUT

(4) -- Other reason: _____

205 Total Number of COV/CSO Prior Convictions Excluded by 10-Year Rule _____

206 Total Number of COV/CSO Prior Convictions Excluded by 15-Year Rule _____

207 Total Number of COV/CSO Prior Convictions Excluded by these Two Rules _____

Instant COV/CSO

300	Offense	Juris-diction	Statute	Maximum/ Minimum	Date Commenced	Date of Sentence

301 Brief Summary of Offense

_____

_____

_____

302 Role In the Drug Offense (Circle One)

P -- Peripheral C -- Courier D -- Deals Above Street Level/Manufacturer
M -- Minor Role S -- Sells to User L -- Leader/Highest Level Dealer
U -- Unknown N -- Not Drugs O -- Other _____

303 Age of Offender at time of Offense _____ years

Range and Sentence

400 Guideline(s) Applied for Substantive Offense _____

401 Guideline Total Level and Range level _____ _____ months

402 Chapter 3 Reduction for Acceptance
A -- Applied N -- Not Applied

403 Sentence Imposed _____ months

404 Departure Entered
U -- Upward Departure
D -- Downward Departure
A -- Apparent Departure (Indicate Direction)
N -- No Departure

Basis for Departure _____

405 Potential Total Level and Range
If Career Offender Were to Apply level _____ _____ months

Criminal History

500 Criminal History Points _____
501 Criminal History Category _____

Miscellaneous Comments

600 Court Comments on Criminal History / Career Offender _____
601 Comments _____

Estimation of the Number of Additional Career Offender Cases
Assuming No Decay Factor

The purpose of this note is to estimate how many additional career offenders would be in found in the MONFY90 database if the entire database were examined for cases which would qualify if there were no decay.

The basis for the estimate is a population of 29,011 cases from which a subpopulation of 6707 cases was identified. These cases were all the drug and violent offenders over age 27 with some criminal history. They constitute the only group where additional career offenders could be found. In that group a random sample of 600 cases was selected. Within the sample a total of 15 cases (2.5%) were unambiguously identified as individuals who would qualify as career offenders if the decay factor were abolished.

The best point estimate (single value) for the additional number of career offenders is 2.5% of affected population, thus 6707 * .025 = 168 additional cases. This represents 0.58% of the total database of 29,011 cases. Considering that there are currently 652 identified career offenders in the database, this would increase the total by a factor of 168/652 = .26 i.e. a 26 per cent increase over the current number of career offenders.

The estimate of 168 cases is subject to sampling error. This is usually addressed with an interval estimate for a range instead of a point estimate. Using the normal approximation for the confidence interval requires the equation below: In that equation

$$p \pm \left[t\sqrt{1-f}\sqrt{\frac{pq}{n-1}} + \frac{1}{2n} \right]$$

use p = .025 (the sample estimate), q = 1 - p, n = 600 (the size of the sample), f = 600/6707 (the sampling fraction) and t = 1.96 (the percentage point of the normal distribution to produce a 95 per cent confidence interval). See Cochran (1977, page 57). The bracketed term evaluates to .012 so that the interval estimate for p is .025 ± .012 = (1.3% to 3.7%). Multiplying both ends of the interval by 6707 (the pool of possible career offenders) produces a range of (88, 248). Thus we can state with 95 per cent confidence that there are between 88 and 248 additional individuals in the file who would be considered career offenders should the decay factors be modified.

Using the same approach as before, this would amount to an increase of between 88/652 = 13% to 248/652 = 38% with 95% confidence.

Reference

W. G. Cochran (1977), *Sampling Techniques.* John Wiley and Sons, NY.